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No. 709. UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS, *v.* BERWIND-WHITE COAL MINING COMPANY ET AL., APPELLEES

No. 710. UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS, *v.* BETHLEHEM STEEL COMPANY ET AL., APPELLEES

No. 711. UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS, *v.* RAINEY-WOOD COKE COMPANY ET AL., APPELLEES

No. 712. UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS, *v.* PUBLIC SERVICE ELECTRIC AND GAS COMPANY, APPELLEE

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FEBRUARY, 1927.

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No. 709 UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants, v.* BERWIND-WHITE COAL MINING COMPANY, WESTMORELAND COAL COMPANY, NEW RIVER & POCAHONTAS CONSOLIDATED COAL COMPANY, and PENNSYLVANIA COAL & COKE CORPORATION, *Appellees.*

No. 710 UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants, v.* BETHLEHEM STEEL COMPANY, BETHLEHEM MINES CORPORATION, and BETHLEHEM STEEL CORPORATION, *Appellees.*

No. 711 UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants v.* RAINEY-WOOD COKE COMPANY, SEABOARD BY-PRODUCT COKE COMPANY, CHICAGO BY-PRODUCT COKE COMPANY, and DONNER-HANNA COKE CORPORATION, *Appellees.*

No. 712 UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants v.* PUBLIC SERVICE ELECTRIC AND GAS COMPANY, *Appellee.*

BRIEF FOR APPELLEES

The case below is reported in 9 (2d) Fed. 429.

STATEMENT

On March 22, 1921, in a proceeding entitled *"Assigned Cars for Bituminous Coal Mines"*, the Commission instituted an investigation upon its own motion into the rea-

sonableness and propriety of the then existing car distribution rules "insofar as they apply to privately owned coal cars and cars furnished for railway fuel coal". Thereafter, by Report and Order (*Assigned Cars for Bituminous Coal Mines,* 80 I. C. C. 520, R. 15), affirmed on rehearing (93 I. C. C. 723, R. 82), the Commission found that the then existing rule of the carriers governing the placement of such coal cars for loading was unreasonable under Sec. 1 of the Interstate Commerce Act and unduly discriminatory under Sec. 3 thereof, and ordered the carriers to cease and desist therefrom and to establish in lieu thereof the rule set forth in the order. Commissioners Hall, Daniels, Potter and Cox dissenting.

The Court below set the order of the Commission aside, in so far as it affected private cars by identic decrees in each of the four cases named in the caption (R. 221) and, in so far as it affected railway fuel cars in a suit brought by the Akron, Canton & Youngstown Railway Company, *et al.* All five cases were together heard below and all are here on appeal by the United States and the Commission.

1. Scope and effect of order.

Privately owned coal cars and cars furnished for railroad fuel coal, are collectively known technically as "Assigned Cars"; this by reason of the fact that they are assigned by the owner of the car (whether a railroad company obtaining coal for fuel, or a shipper owning cars used for the transportation of its coal) for loading at mines, either owned by the owner of the car or with which it has contracts for coal. Coal cars of railroad ownership, other than those assigned to the loading of railroad fuel coal, are known and will be referred to as "system cars".

Car distribution rules assume importance only in times of car shortage; that is to say, when car orders exceed car supply. To provide for such periods the capacity of such mine is rated in cars per day. A mine may order cars each

day up to but not exceeding its rated capacity and in time of a car shortage generally does so (even though it might not actually have equivalent orders for coal) in order that it may get as many cars as possible.*

Under the practice now prevailing, but condemned by the Commission, all private cars (to the use of which system car mines have no right,—that right being conceded to be exclusively in the owner of the car), and railway fuel cars are placed at the mine to which assigned even though such mine thereby receives cars to a greater extent of its rated mine capacity than is true of mines not having assigned cars. If such cars equal or exceed the pro rata of mine capacity to all cars on hand, such mines receive no system cars. It is only when such cars are less than such *pro rata* that such mines share in the distribution of system cars, and then only in such numbers as bring its cars up to such *pro rata*. The distribution of system cars to system mines is of course based on the *pro rata* available. The effect of the Commission's order is to forbid a mine to have the use of any private cars or railway fuel cars in excess of the same proportion or *pro rata* of rated mine capacity to which mines not having assigned cars are able to receive cars.

In respect of railway fuel cars, the effect of the order under review is to prohibit the placement of such cars, in times of car shortage, at any mine owned by the Railway Company, or with which it has contracts for coal in sufficient numbers to load the output of such mines (or the proportion thereof taken by the Railroad Company for fuel purposes), provided the cars required for this purpose exceed the *pro rata* allotment of system cars, of which there is a shortage, at mines at which the Company does not obtain fuel, and which, for the loading of their output, are dependent upon system cars.

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*The rules governing mine ratings and the number of cars which each mine may order, are not involved but have been fixed by the Commission in another case, *In re Rules Governing Ratings of Coal Mines*, 95 I. C. C. 309. This case relates solely to the distribution of the cars on hand.

In respect of private cars, the order prohibits any railroad, when there is a shortage of system cars, from placing private coal cars at any mine of the owner of such cars (or with which it has contracts for coal) in excess of the number of system cars placed on the same day at a mine of similar capacity, which is dependent upon system cars for its supply. The order applies irrespective of the number of such private cars available for placement and loading. It applies when the carrier has motive power and other facilities sufficient to move all available cars, both system and private, as well as when it has not.

The order is universal in its application and admits of no exception for any cause. It runs against every railroad in the United States, although as to the conditions on many, including many coal loading roads, there was no evidence.

Each of the appellees had found by experience that it could not rely on the coal equipment of the railroads to provide the daily supply of suitable coal necessary for its operations in times of periodic and recurring coal car shortages, which shortages were due largely to the sudden expansion of orders for cars on the part of high cost mines which operated irregularly and principally only in times when the coal business was exceptionally active. Each, therefore, became a private car owner to protect its coal supply at such times. The mileage allowances made for the use of such cars by the railroad are insufficient to pay for their upkeep. The only advantage in their ownership lies in their use in times of car shortage. The order thus deprives the respondents and other owners of private cars of all beneficial use thereof.

The effect of the order was thus illustrated by the District Court in its Opinion (Akron* R. 23-24):

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*At page 151 and elsewhere in the printed record in the present cases reference is made for certain matter to the printed record in *United States et al.* v. *Akron, Canton & Youngstown Ry. Co. et al.*, No. 606, assigned for argument herewith. References in this brief to matter printed in the record in No. 606 are indicated as follows (Akron R. 00):

"To illustrate, we will assume that in a given mining district a group of mines served by system or railroad owned cars has aggregate ratings of five hundred cars and that a mine served by private cars has a rating of one hundred cars; that the number of cars available including private cars is such that fifty per cent. distribution prevails, but there are present one hundred private cars. In that case, only fifty private cars can be placed for loading and moving; the other fifty private cars must either stand idle on the sidings or will be appropriated for the use of others than their owners.

"The same situation will result as to the fuel cars of the railroads and, in each case, notwithstanding the fact that during such coal car shortage there may be no corresponding shortage of other railroad facilities, such as track, motive power, and labor. This is so because, during car shortage, the order is to be universally applied, whether or not the railroad system has ample facilities for movement of the cars and whether or not such facilities are, by reason of the order, excluded from service through which the railroad company could be carrying on its operations and earning freight."

The order does not require the resulting surplus of private cars to be appropriated for general use, and the Commission's Report distinctly disclaims any power so to do. Unless the owner consents to such appropriation, however, cars which he owns and needs, and which he bought as a protection against system car shortages, must stand idle, even though the Railroad Company is able and willing to place and move such cars and all system cars available for loading as well. It appears beyond doubt from the Report of the Commission that, while it disclaims any power to require the appropriation of private cars for general use, the intended effect of the order is either to coerce private car owners into consenting to such appropriation, or to retire such cars in large numbers from service when-

ever there is a shortage of system cars. In either event, the private car owner is deprived of the use of its cars and prevented from obtaining the daily supply of suitable coal, which it requires in its operations, and to insure which, in times of car shortage, its cars were acquired. To the extent that private cars are thus retired from use, the interested railroad company is likewise deprived of the right to earn the revenues which would accrue from carrying the owner's coal in the cars standing idle.

The right to the ownership and exclusive use of private cars is not derived from any decision of the Commission. It is a very old right long ante-dating the enactment of the Interstate Commerce Act. At no time prior to its present order has the Commission asserted (nor has any court upheld) the power to prohibit this use of private cars by their owners. In all of the previous cases involving car distribution the Commission and the Courts have recognized and observed the ancient right of a shipper, open alike to all shippers, to tender his shipment for transportation in his own car and to have it transported when and as so tendered. The present order is revolutionary in that it asserts for the first time the power to prohibit this long recognized right to the ownership and exclusive use of private cars even though the carrier is willing and able to move them as well as all other traffic currently offered.

Private car owners do not contend that their cars are entitled to undue preference in movement. They do contend that when a railroad company has the facilities necessary to move, without preference, all private and system cars available for placement and movement, it is not unlawful for it to do so. Under such circumstances they assert that they are entitled to receive and that the railroad company is entitled to furnish the transportation involved in such use.

2. Necessity for ownership of private cars and disastrous effects of the order on the owners thereof.

2. (*a*) CAUSES OF COAL CAR SHORTAGES.

So-called coal car shortages are due primarily to the over-development of the coal mining industry and to the fact that demands for coal are seasonal. The Commission finds that the annual productive capacity of the mines greatly exceeds annual consumptive demand (R. 30). The evidence indicates that such productive capacity is perhaps double consumptive demand. The Commission also finds that in times when there is a peak demand for coal the less economical mines open up and begin to ship, thus increasing car orders. Mine ratings upon which the right to order cars is predicated are based upon mine capacity, which greatly exceeds the fuel needs of the country or its capacity to consume coal. Each mine has the right to order cars up to its full rating. The aggregate right to order cars, therefore, represents aggregate mine capacity. It is well settled that a carrier is under no duty to provide itself with equipment for peak demands, but only with that which is normally required. *Pennsylvania Railroad Company* v. *Puritan Coal Mining Company*, 237 U. S. 121, 133; *Logan Coal Company* v. *Pennsylvania R. R. Company*, 154 Fed. 497, 502; *Montana W. & S. R. Co.* v. *Morley*, 198 *Fed.* 991, 998; *In the Matter of Private Cars*, 50 I. C. C. 652, 671.

It is therefore apparent that, with a legally adequate supply of coal cars, a fictitious coal car shortage is automatically brought about in times of peak demand when the uneconomical mines are open for production and all mines are placing orders for their full ratings, based on aggregate capacity. With aggregate capacity approximately double normal consumptive demand, something like a 50% coal car shortage is thus automatically brought about in a period of peak demand, without any diminution in the amount of coal actually shipped.

System coal car shortages thus result from conditions within the coal industry rather than from transportation difficulties or delinquencies. Thus enterprises so organized as to have a reasonably steady demand for coal throughout the year are, if dependent upon system cars, liable to have the regular movement of their coal interfered with by the shortages in system cars due not to fault of the railroads but to sudden expansion of demand for system cars by mines which do not operate with regularity. It is largely as a safeguard against such conditions that private cars are required by many enterprises needing regular coal movement. The shortages in system cars are in no way contributed to by private car ownership. On the contrary such ownership and use decreases *pro tanto* the shortage which would otherwise result.

Private coal cars are owned chiefly by critical industries of the character represented by the appellees in the Bethlehem, Rainey-Wood and Public Service cases, for which a daily dependable supply of carefully selected coal suitable for its particular purposes is essential, or by coal companies supplying such industries with coal, such as the appellees in the Berwind-White Company case.

2. (*b*) NECESSITY FOR PRIVATE CAR OWNERSHIP, AS STATED BY THE COMMISSION ITSELF.

The use of private cars is not peculiar to the coal industry. Necessity for a dependable supply of cars to be used exclusively in the business of their owner and sent where needed, has led to the ownership of private cars of many other descriptions, the necessity and economic advantage of which has been fully recognized by the Commission.

In the *Matter of Private Cars,* 50 I. C. C. 652, 683, the Commission said:

> "It is clearly established that shippers of petroleum oils, fresh meat, packing-house products, and dairy products could not have done the volume

> of business they have done in the past, or that their plants were constructed to do, except they had possessed themselves of private cars over which they could exercise, and have exercised, control. The refiner of oil or the meat packer could no more do business on an economical and efficient basis without his private cars than he could without his modern equipped refining or packing plant. * * "

While private coal cars are not mentioned in this paragraph, their use is as necessary to the critical industries using them as are private refrigerator or tank cars to the industries to which they are devoted.

Altogether there are 230,221 privately owned freight cars in service. Of these, 29,000 are coal cars (R. 1624) and to these only the order supplies. If, however, it is unlawful to make full use of private coal cars in times of car shortage, even though motive power and other facilities are at hand to move them as well as all system cars, it is seemingly equally unlawful in times of car shortage to permit other private cars to be fully used, notwithstanding the admitted right of ownership and use and the economic advantages arising therefrom.

2. (c) THE CASE OF THE STEEL COMPANIES:

The situation of the Steel Companies, appellees in case No. 710, is thus stated in the Opinion of the Court below (Akron R. 50):

> "In the case of Bethlehem Steel Company et al., No. 3273, the plaintiff, Bethlehem Steel Company, is engaged in the manufacture, sale, and shipment of iron and steel products at plants operated by it at Bethlehem, Reading, Lebanon, Coatesville, Steelton, and Johnstown, Pennsylvania, Sparrow's Point, Maryland, and Lackawanna, New York. The Bethlehem Mines Corporation produces bituminous coal at mines owned by it in Pennsylvania and West Virginia for consumption by the Bethlehem Steel Company. The Bethlehem Steel Corporation, by stock ownership, controls the Bethlehem Steel Company

and the Bethlehem Mines Corporation. These plaintiffs own 3,975 coal cars, representing an investment of more than $8,000,000, which are used in the transportation of bituminous coal from the mines of the Mines Corporation to the plants of the Steel Company. The steel plants represent an investment of more than $108,000,000 and employ approximately 45,000 men, and the coal mines represent an investment of more than $68,000,000 and employ approximately 7,800 men.

Bethlehem's mines are located on and served by the lines of the Pennsylvania, Baltimore and Ohio, the Buffalo, Rochester and Pittsburgh, and the Cambria and Indiana Railroads. Coal mines operated by Bethlehem were acquired and are operated to produce coal of specific and unvarying metallurgical quality and in constant and adequate quantities necessary for production of the grades of the steel made at its plants. The productive capacity of these mines is approximately 9,500,000 tons annually, all of which is necessary for the requirements of the steel plants and is, with unimportant exceptions, not sold commercially. These mines were selected and the 3,975 private cars were acquired by Bethlehem to meet its necessities in producing special grades of steel for such products as steel rails, bridge steel, car wheels and axles, automobile steel, and ordinance steel, of which latter product Bethlehem has produced more than half of all ever used by the United States Government.

It was found that Bethlehem could not rely upon bituminous coal purchased indiscriminately from available mines, because it is necessary to have definite knowledge of the properties of the coal used in its coke ovens in order to produce the special grade of steel necessary in each steel product manufactured in its plants. Chemical impurities, such as phosphorus and sulphur, when present in improper or unknown quantities in coking coal, produce impure coke, which, in turn, results in impure and defective steel. Its coke is produced in by-product ovens at its various plants. The quality of the coke produced, dependent upon the quality

and known contents of the coal used, is essential to the carrying on of this industry.

In addition to the necessity of having coal of proper and known physical properties in order to produce the proper quality of steel, coking coal of improper kind and quality results in the crumbling of the coke produced by reason of its being of insufficient physical strength to bear the burden placed upon it in the blast furnaces, and is also destructive of the coke ovens through swelling within them, resulting, when a coke oven is thus destroyed, in the expense and delay of rebuilding the oven and the interruption of the operation and production of the plaintiff's plants. As bearing upon the necessity of a continuous uninterrupted supply from the mines, it is an established fact that metallurgical coking coal not only cannot be successfully stored in substantial quantities for extended periods because of the risk of spontaneous combustion, but that such storage causes the coal to lose its properties essential to coking and renders it useless for metallurgical processes."

The foregoing statement by the District Court is based on the uncontradicted testimony before the Commission (R. 1290-1302; 1315-1323). As further bearing upon the importance of a dependable supply of suitable coal, it is shown by uncontradicted testimony in the *Bethlehem* case that not to exceed 15% of the bituminous coal in the ground is suitable for the manufacture of coke and that before purchasing its mines the Bethlehem company spent more than a year in investigation and analysis and examined over 300 mines before making its final selection (R. 1291). It had also found by experience that, in times of periodic car shortage, it could not rely upon the use of system cars to carry the output of such mines to its plants, and hence purchased the 3975 coal cars referred to by the Court (R. 1302-3). Its mines are used exclusively in the mining of its own coal and are not in competition with system car mines. Its cars are used exclusively in the carriage of its own

coal from its own mines to its own coke ovens at its own steel plants (R. 1303). Since it became a private car owner, Bethlehem has never requested placement of system cars at its private car mines, its own supply of private cars being sufficient (R. 1303). The effect of the order is to prohibit any railroad company on which a Bethlehem mine may be located from placing Bethlehem cars at its mines for the purpose described, in excess of the pro rata allotment of system cars placed at system mines, even though the railroad company may be in a position to place and handle all of Bethlehem's private cars and all system cars actually available for distribution as well. The only effect is to deprive Bethlehem of the dependable supply of coal which it needs. The supply of available system cars is in no way increased.

Mr. Charles M. Schwab after testifying as to the absolute necessity for a regular and adequate supply of selected coals and the impossibility of relying on the spot market stated:

> "I regard the cars that transport coal to our coke ovens as just as important a part of our manufacturing establishment as the rolling mill that rolls the ingot after it is made, or the hearth that converts the pig iron into steel, or any other branch of the business." (R. 1317)
>
> * * * * * * * * * *
>
> "You could buy coal probably (in the spot market) but it would not be coal suitable for the purpose, or even have it transported. It could not be done. I would rather lose the cars between one or two departments of our steel works, than to lose the cars that would transport our coal to our ovens if I had to have such an interrupted operation." (R. 1319)
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> * * * * * * * * * *
>
> "I cannot tell you the economic disadvantage that it (deprivation of private cars in times of car shortage) would be to the steel works and the

> national industries of this country. It would be the greatest economic step backward for steel manufacture that I could possibly imagine." (R. 1320)

The United States Steel Corporation and its subsidiaries, the Illinois Steel Company, the Carnegie Steel Company, the American Steel & Wire Company, The National Tube Company, The American Sheet & Tin Plate Company, the United States Coal & Coke Company, the United States Fuel Company, and the H. C. Frick Coke Company, are intervening plaintiffs in the *Bethlehem* case and together own 6029 private cars. The Steel Company of Canada, Ltd., The Cleveland Cliffs Iron Company, The Perry Iron Company, and the Youngstown Sheet and Tube Company, all engaged in the manufacture of iron and steel products, are likewise intervening plaintiffs in the same case, owning in the aggregate 1734 private coal cars. Bethlehem's situation, as set forth above, is illustrative of that of the steel companies in general, as evidenced by the record before the Commission, and as stated in detail in the Opinion of the Court below (Akron R. 53).

2. (*d*) The Case of the By-Product Coke Companies

The situation in respect of the By-Product Coke Companies, appellees in case No. 711, is thus described in the Opinion of the District Court based upon the uncontradicted evidence before the Commission (Akron, R. 606):

> "In No. 3275, the Rainey-Wood Coke Company, the Seaboard By-Product Company, the Chicago By-Product Company, the Donner-Hanna Coke Corporation are corporations engaged in operating by-product coke ovens at, respectively, Swedeland, Pennsylvania, where 110 ovens and by-product recovery apparatus are operated, at Kearney, New Jersey, where 165 ovens and by-product recovery apparatus and water-gas-making apparatus are operated; at Chicago, Illinois, where 105 ovens and by-

product recovery apparatus in connection therewith and water-gas-making apparatus are operated; and at Buffalo, New York, where 150 ovens and by product recovery apparatus are operated. These corporations require a constant supply of bituminous coal of uniform quality and character for the operations of their by-product coke-ovens. Rainey-Wood Company owns 400 private cars; the Seaboard By-product Company, 1,000 cars of which 650 are leased and operated by the Chicago By-Product Coke Company; and the Donner-Hanna Coke Corporation owns 500 such cars. There is invested in these cars the sum of $6,300,000, and they are used in the transportation of coal from bituminous mines to their plants.

These companies by modern processes save and preserve the by-products of coal, invaluable in industries, in public and domestic use, and in the sciences of chemistry and medicine, by carbonizing bituminous coal, directly producing thereby coke, gas, tar, and sulphate of ammonia. Their coke is sold for metallurgical use in blast furnaces in competition with coke made in the beehive ovens, in which the by-products are wasted, for making watergas by public service corporations, which distribute it to the public. The coke so used must be of quality and structure to produce gas of standard quality and heat value contents. It is sold for industrial purposes in making steam, for domestic purposes, in the heating of houses, apartments, and other buildings.

The coke supplied for making watergas is furnished to public service companies supplying the cities of Philadelphia, New York, Brooklyn, and Chicago, and to many other cities and towns and near-by territory.

The gas produced as a by-product is used for the operation of the plaintiffs' plants and the balance is sold to companies serving municipalities and suburban sections near Philadelphia, Chicago, and Buffalo and their adjacent districts and in northern and central New Jersey. The public gas companies manufacturing their own gas and those supplied

> with gas are dependent at all times upon the supply of coke and gas received to enable them to perform their public obligations and to maintain adequate and efficient public service. The tar produced in the plaintiff's plants is sold for use in the chemical, drug, dye, photographic, building and road material, and other industries. Sulphate of ammonia is used in the manufacture of commercial fertilizers. The light oils produced are refined to produce benzol for motor fuel and, in times of war, toluol and other materials of which essential high explosives are made. It will be seen that, as a fundamental and essential requirement for the conduct of the operations of these companies, it is essential to have, as in the Bethlehem case, an even and continuous supply of bituminous coal of selected and known quality. Their private coal cars are, therefore, used for transportation of coal from mines selected with reference to convenience of delivery and quality of coal produced to their respective plants."

A striking illustration of the disastrous effect of the order upon By-Product Coke Companies is the situation of the Seaboard By-Product Coke Company of New Jersey.

This Company is under a long term contract to supply 25,000,000 cubic feet of gas daily to the Public Service Gas Company of New Jersey, which supplies gas to the public throughout Northern New Jersey. The gas must conform in quality to the requirements and specifications of the public service commission of that state (R. 1203, *et seq.*).

These requirements can be met only from a regular and adequate supply of coal of uniform quality and of definite chemical content. A constant supply of such carefully selected coal is secured through the use of private cars. An interruption in that supply would have disastrous effect upon essential public service.

Mr. H. B. Rust, president of this and other By-Products Companies testified that "a by-product coke plant cannot be shut down," (R. 1208) and that an interruption of the regular supply of selected coal means, *inter alia:*

(1) Great injury to the plant; (2) a delay of from two to eight months before operation can be resumed, depending upon the seriousness of the injury; (3) the deprivation of thousands upon thousands of citizens of their domestic fuel for the period of the shut down (R. 1210).

To avert such catastrophe and insure a constant supply of usable coal, private cars were reluctantly purchased as the only possible solution (R. 1223 and R. 1227).

Mr. Rust further testified that: "As long as the railroad situation is unable to insure us service that will insure constant, uniform supply of coal, such as we need, we would not expand our plants, if these cars are taken away from us, * * * if I am going to safeguard the supply of gas to the public for domestic use in the future. I consider it (the former Assigned Car rule) absolutely necessary, as long as the present conditions continue in the transportation situation of the country."

Thus it is seen that the order of the Commission as applied to this class of private car owner, will jeopardize an essential public service and retard the adoption of the by-product process for coke production, and the elimination of economic waste which it achieves.

2. (*e*) The Case of the Public Service Gas and Electric Company.

The situation of the Public Service Gas and Electric Company, appellees in case No. 712, is thus described in the Opinion of the District Court: (Akron R. 54).

> "The Public Service Gas and Electric Company, the plaintiff in No. 3317, is engaged in the business of generating, manufacturing, and distributing electricity and gas for light, heat, and power for public use. It has distributing systems in 231 municipalities in the state of New Jersey, with a population of approximately 2,600,000. It supplies electric current for lighting dwellings and other private

buildings, public buildings and public highways, and heat and power for manufacturing purposes. Its customers using electricity number 525,000. It manufactures and distributes gas for light, heat, and power for domestic, commercial, and manufacturing uses. Its gas customers number 643,000 and its business is rapidly increasing. It uses daily 2800 tons of bituminous coal for generating electricity and 890 tons for the manufacture of gas. Its generating stations are located in New Jersey, where there are no coal mines. It obtains its coal supply from mines in Pennsylvania, taking the entire output of two mines. In September, 1920, it purchased 600 coal cars at a cost of $1,750,000 to carry its coal from the mines to its generating and manufacturing station, being impelled to do so by reason of its inability to obtain a regular and constant fuel supply of the proper quality and grade during coal car shortages, except through priority orders induced by reason of the necessities of its business in serving the public. Prior to purchasing the cars, Mr. Farrand, Assistant to the President, laid the situation before Commissioner Aitchison of the Interstate Commerce Commission, and was referred by him to the ruling in the *Hillsdale Coal* case, 19 I. C. C. 356, as ground for assurance that owners of private cars are entitled to their exclusive use so long as such cars are counted against the distributive share of the mines to which assigned. The mines from which the plaintiff receives its coal are under ten-year contracts for the output of the mines, aggregating 1,000,000 tons a year. It is the purchaser of 25,000,000 cubic feet of gas a day from the Seaboard By-Product Coke Company."

Mr. Farrand testified to the impossibility of relying on the spot coal market in times of car shortage (R. 1070) and made the following emphatic statement with reference to the absolute necessity for the use of private cars:

"In this period from 1917 to 1920 it was absolutely essential for our company to resort to the assigned car. The only way we were permitted to op-

erate was by the use of assigned cars. The only other effective remedy than assigned cars was the case of coal commandeered during the war to maintain essential war industries." (R. 1091)

The Commission's order as applied to this Company during an acute car shortage might readily produce a shut down of its plans and leave 80% of New Jersey's manufacturing industries, street railways and homes without gas or electricity, while the Company's private cars in which the requisite coal could be transported stood idle on the tracks.

2. (*f*) THE CASE OF THE COAL COMPANIES OWNING PRIVATE CARS.

Appellees in No. 709 are owners and operators of bituminous coal mines. Their situation is thus described in the Opinion of the District Court:

> "In Suit No. 3271, the plaintiffs are owners and operators of bituminous coal mines. The mines of Berwind-White are in Clearfield, Cambria, and Somerset Counties, Pa. It owns 3036 private coal cars of the value of approximately $6,000,000.
>
> The mines of the Westmoreland Coal Company are located in Westmoreland County, Pa. It owns 2012 private coal cars of a value of approximately $4,000,000. The mines of the New River Pocahontas Consolidated Coal Company are located in Fayette and McDowell Counties, W. Va. It owns 1000 private coal cars of a value of approximately $2,000,000. The mines of the Pennsylvania Coal & Coke Corporation are located in Cambria, Clearfield, Indiana, and Blair Counties, Pa. It owns 1000 private coal cars, of a value of approximately $2,000,000.
>
> A large part of these coal companies' production of bituminous coal is contracted for and delivered annually to public utilities and other public use consumers."

The Berwind-White Company's cars are chiefly used in supplying outgoing steamships in New York Harbor with bunker coal and in supplying public utilities in New York City with coal to keep them running. For both a dependable supply of coal suitable for their purposes is essential.

The effect of the order in this case is to prevent the appellees from carrying out their contracts with such public utilities and other customers and to interrupt the necessary supply of coal for such public use, without in any way increasing the supply of coal cars for operators dependent upon system cars. And while the coal cars of these appellees are forced into idleness by the Commission's order, the private tank cars of its competitors, carrying fuel in competition with bunker coal, will continue in full and uninterrupted movement to the waiting steamships. Thus oil burning ships will sail on time while coal burners (Berwind-White's customers) are held up in order to insure equal working time among all coal mines (R. 1278 *et seq.*).

2. (*g*) Summary of Economic Effect of the Commission's Order on Appellees.

As to the industries of appellees and their customers, the order will produce the following results:

(1) Assigned car mines will be compelled to reduce loadings to conform to the average of system car mines.

(2) Private coal cars, representing large investment and sorely needed by their owners, will stand idle on the tracks.

(3) Steel industries will be partially or completely shut down and thousands of steel workers will be thrown out of employment.

(4) Coke and By-product companies will be partially or completely shut down and their employees temporarily deprived of their means of livelihood.

(5) Public utility companies will be compelled to resort to the unsatisfactory and uneconomic spot market for coal.

(6) The supply of gas and electricity to the public will be seriously curtailed.

(7) Coal burning steamships will be delayed in sailing.

(8) The further development and expansion of the by-product coke process will cease.

ANALYSIS OF THE TWO REPORTS OF THE COMMISSION IN THIS CASE.

The sole question involved is the power of the Commission to make the order. The basis upon which the order rests may therefore be best determined by a consideration of the reports of the Commission itself. The legal effect of the matters considered by the Commission will be dealt with in the argument. But the reports are very long, and it is believed can best be comprehended by an analysis of the reports themselves in the order in which the several matters referred to are dealt with therein. We accordingly present such an analysis with our parenthetical comments thereon, as an appropriate introduction to the argument proper.

I. The First Report.

The Commission first gives a history of the present and former rules concerning assigned cars (R. 19-26).

The Commission then discusses the legislative history of Section 1(12) of the Act and decides in effect that that provision was not designed either to require a pro rata distribution of railroad fuel cars and private cars to all

mines, or to prevent distribution of railroad fuel cars and private cars to a mine to which they are assigned (R. 26-29).

PURCHASE AND HANDLING OF RAILROAD FUEL.

The Commission then devotes itself to the consideration first of the purchase and handling of railroad fuel. The Commission stresses certain premises, i.e., that in some lawful way railroads should be assured of a steady supply of suitable coal, should not be subjected to the payment of unreasonable prices for their fuel, and should not be permitted to coerce the mines into receiving an unreasonably low price for fuel, and that confiscation of fuel coal is a practice to be avoided (R. 29-30).

(All of these matters are outside of the scope of the Act.)

The Commission also mentions that in emergencies the railroad must be given by some lawful means priority over less necessitous uses.

The Commission then discusses the various methods adopted by railroads to secure coal for their carrier operations, showing that some carriers own their own mines, others contract for the entire output of certain mines, and others have partial output contracts. It points out that some railroads do not adopt the practice of specially assigning cars to receive their own fuel. The Commission points out wide diversity of conditions in different parts of the country in the matter of purchase and reception of coal for carrier fuel, refers to the necessity of uniform quality, suitable grade, special adaptation to stoker fired engines, etc. (R. 30-35).

(These comments, while of interest on the important managerial question of how some of the carriers purchase the supplies needed in their operations, do not pertain to a subject matter which is within the scope of the Act.)

The Commission next discusses the position of the opponents of the present railroad practice of placing cars to receive railroad fuel. The Commission indicates that it is claimed that the effect of the practice is to diminish to some extent the supply of cars placed at commercial mines during car shortages. The Commission refers to various details showing that if all railway fuel cars and all private cars on certain railroads were distributed on a pro rata basis to all mines instead of to the mines to which such cars are assigned, there would have been an increase in cars placed at mines which did not receive assigned cars. The Commission suggests that if a preference exists it ought to be corrected even though small (R. 36-37).

> (The Commission states no facts indicating that any illegal preference exists by reason of the natural mathematical result that mines without assigned cars have fewer cars than they would have if the assigned cars also were prorated to them.)

At various places in the part of its report dealing with railroad fuel cars, the Commission comments on certain special methods of applying the existing rules. These special phases may be summarized as follows: Certain special aspects of one carrier handling the railroad fuel cars of another carrier, (R. 39-40); the alleged greater wastage at times of cars at mines having assigned cars than at other mines (R. 40). Certain other details connected with the way in which existing rules are at times applied (R. 41-44).

> (The Commission does not indicate that these things could be made a basis for the universal order that has been adopted, nor does it indicate that these things cannot be corrected whenever necessary by action directed to them in accordance with the Act.)

The Commission examines the state of the bituminous coal mining industry, and says it is greatly over-developed,

with a surplus of labor; that when car supply is plentiful or demand for coal is low many of the least economical mines are closed; that as car shortages develop and demand increases, the opening of the weaker mines is encouraged and the paradox is presented that as the car supply becomes worse the capacity of the mines increases even more, thus the car supply, already diminished by reduction of supply of cars is further diluted by the increase in the demand and distribution to the enlarged coal mine capacity brought into operation, and thereby efficiency of distribution is impaired (R. 40-41).

> (Thus a so-called shortage is just as likely to be due to a suddenly and perhaps spasmodically expanded demand as it is to an abnormally low number of cars. The Commission's comments do not tend to show that the placing of railroad fuel cars or private cars in accordance with the assignment of the owners violates the Act. Upon the matter of public policy involved,—which, however, is outside the scope of the present Act,—the majority and minority Commissioners draw different conclusions. The matter has been repeatedly presented to Congress and it has declined to prohibit the use of assigned cars. This portion of the Commission's report therefore merely emphasizes the Commission's manifest disposition in this case to deal with matters outside the scope of the Act instead of basing its action upon the specific principles which it enacts into law.)

The Commission then turns to the effect upon mine labor of the practice of permitting railroad companies to purchase coal from such mines as they see fit and to receive all coal so purchased even though all commercial mines cannot be given a full car supply. The Commission shows that if the mine with the railroad contract has a more uniform output than the mine without such contract,

the operating costs of the mine without such contract are unfavorably influenced, and the Commission points out that organized mine labor is solidly opposed to the present situation (R. 43-47).

> (But the fact that a mine with a contract for railroad fuel can operate more regularly than a mine not having such a contract, and can enjoy more satisfactory labor conditions and lower operating costs, does not render such contract unlawful under the Interstate Commerce Act or make it unlawful for the carrier to place cars so as to receive its fuel in accordance with such contract. The matter is one outside the scope of the Act. Here also the majority and minority of the Commission draw opposite conclusions as to which solution is the sound public policy.)

The Commission indicates that the indirect cost to the consuming public must be considered in weighing the benefits the railroads derive from the present method of purchasing and receiving their coal (R. 44).

> (This indicates that the Commission regards as a relevant consideration in this proceeding a matter which is outside the Act and which is for Congress but not for the Commission and a matter by which Congress has declined to be governed.)

The Commission then enters upon the question whether carriers are able to secure their coal at lower prices through the ability to make contracts for coal purchases from particular mines and place cars at the contract mines to the extent necessary to receive fulfillment of the contracts. It concludes that the railroads do not deliberately coerce unreasonably low prices, but that the ability to make such contracts and receive fulfillment of them is a factor which influences the price. The Commission indicates that it is entitled to consider this matter in its bearing upon the fact that the commercial mine operator may

some times be forced out of the commercial business and into selling to the railroad at a lower price. The Commission concedes that a different situation exists when the carrier owns its own mine and indicates that an intermediate situation exists if the carrier takes a lease of a mine. The Commission intimates that if a railroad should be permitted to own its own mine and to place cars there to the extent necessary to receive the output, while being prohibited from placing its cars at another mine to receive coal under a contract for railroad fuel, the tendency might be to induce railroads to open new mines and thus undesirably add to the capacity of an already over-developed industry (R. 44-45).

(Since the present Act does not deal with the purchase by carriers of their supplies and materials, such considerations are for Congress but not for the Commission.)

The Commission then looks to the alternatives which the carriers might employ to meet their resonable fuel requirements if they are prevented, (as the Commission's order intends), from receiving their fuel in their cars to the extent necessary to take the output of mines owned or controlled by them or of mines with which they have made contracts. The Commission concludes that these alternatives are to store more coal in other periods of the year, to make contracts with a greater number of mines instead of concentrating upon a comparatively few mines either owned or contracted with, and if necessary by getting the Commission to suspend its proposed rules on the ground of emergency (R. 45).

(The enumeration of these alternatives indicates how fully the Commission's action is beyond the scope of the present Act. The Commission is not empowered either directly or indirectly to compel railroads to store their coal,—*a fortiori* it is not empowered to do so by a universal order ignoring the

great range of differences in cost of storage and adaptability of coal for storage—or to compel the carriers to make contracts with numerous mines instead of acquiring mines or confining their contracts to one or more mines.)

The Commission then suggests that if the railroads are to be permitted to obtain their fuel at their own mines or on contracts and to receive such fuel by placing cars to the extent necessary therefor even though commercial mines do not have a full car supply, then there is good reason why the Commission should consider extending the same privilege to other public utilities and quasi-public utilities (R. 45-46).

(This again illustrates the Commission's conception that the Act has conferred upon it the power to determine how and where the carriers shall obtain the fuel necessary for their operations. The Commission ignores the fundamental distinction between what the carrier itself may do in its managerial operations which are not dealt with by the Act and what the Act prescribes as to the relations between carriers and shippers.)

The Commission then makes the suggestion that the present assigned car rule was not the product of ripe experience, and also was subject to certain modifications (affecting only railroad fuel cars and not private cars) during Federal control of railroads, and was not subject to any test except during the period of car shortages (R. 46-47).

(These observations throw no light upon the applicability of the Act to a matter not dealt with at all by the present practice,—and indeed not dealt with at all by the present Act—i. e. a restriction upon the right of a railroad company to use its cars to receive its coal supplies at its owned or contract mines or the right of owners of private cars to have them placed and hauled, when doing

so does not give those owners an unduly preferential use of other railroad facilities. As bearing on the references made in the Commission's report to the policies adopted by the Fuel Administration and the Railroad Administration during the war, it is well to remember that these policies were not adopted because they were required by or were within the scope of the Act, but because they were regarded as appropriate managerial dispositions at a time when all managerial authority over the railroads and much if not all of it over the coal mines were concentrated for war purposes in the hands of the President.)

(Up to this point the Commission's report indicates clearly that it regards as relevant and controlling with reference to railroad fuel cars factors which are entirely outside the scope of the Act.)

PRIVATE CARS.

The Commission then says (R. 47), that much of what has been said as to practical effects of assigned railroad fuel cars is equally descriptive as to private cars.

(But nothing that has been said as to railroad fuel cars has been said with reference to the application of any requirement or prohibition contained in the Act.)

The Commission shows that the handling of private cars in accordance with the assignment made by their owners was sanctioned by the Railroad Administration, (R. 47), and refers to the history of the use of private cars, (R. 47-49). This history shows that before the orders under review the Commission never undertook to make any rule which would attempt to limit the right of the owner of the private car to use it for his own purposes, (assuming, of course, that there was involved no undue preference in the use of other railroad facilities).

The Commission then points out that an undue preference as to car distribution may be very important, that the use of private cars has been recognized by Congress, with power in the Commission to fix the maximum compensation to be paid therefor by the carrier, and that the carrier must see that the use of the private car does not permit an undue preference in favor of the owner (R. 49-50).

The Commission then announces that when a carrier permits the use of a private car, the car is thenceforth not a private car but a railroad car.

> (It is evident that the majority of the Commission makes this observation in the sense that under the Act it is permissible for the Commission to prevent the owner of a private car from having any special benefit from its use or enjoyment and to assign such car to some other shipper who does not own it. The Commission's observation in this sense, if valid at all, could not be confined to private coal cars but would apply to every form of private car including tank cars, refrigerator cars, etc., of which there are probably over 200,000, representing a value of upwards of $250,000,000, in use by the owners thereof throughout the country. This observation of the Commission is important because it shows one of the fundamental misconceptions upon which the Commission's order is based and without which it would not have been made. Such a position is incompatible not only with the language of the Act but with the history of the attitude of Congress toward private cars.)

After some reference to the growth in the use of private coal cars (R. 50-51) the Commission makes certain hypothetical predictions to the effect that as competition becomes more keen other industries will be compelled to acquire private cars with the result that there will be an

increasing gross inequality in favor of their owners and with the further result that there will be taken up by their owners a greater degree of the available rail facilities other than cars, so that commercial mines will find themselves unable to procure transportation for even the cars available to them, and that this will lead to the effort to secure assignment of privately owned locomotives and train crews, and that such requests were made in 1922 (R. 51).

(These predictions rest upon the assumption that any inequality arising from an owner having control of his private cars in time of car shortage is, as a matter of law, an undue preference under the Act and also upon the assumption that the Commission will permit the unduly preferential absorption of other facilities by the owners of private cars without correcting such situation under the Act.)

In an effort to summarize the evidence as to private cars, the Commission refers to the following:

A statement indicating that in the year 1920 in the State of Pennsylvania, on the average but not always, certain mines with private cars worked a greater number of days than was worked by all mines (R. 51).

(This is not surprising since the Commission has explained that the less efficient mines operate less regularly than the more efficient mines. There is nothing in the Commission's report or record establishing the fact that the larger number of days worked by certain mines having private cars was attributable to any unduly preferential absorption by those mines of other transportation facilities.)

In 1920 a coal and coke company on the Cumberland Division of the Louisville & Nashville Railroad had a rating equal to one-sixteenth of the entire rated mine capacity on that Division, but such coal company's private cars received one-eighth of the use of the transportation facilities, getting 100% of their requirements regardless of shortage of motive power, while unassigned mines received

a much lower percentage, because of inequitable distribution of such power (R. 52).

(Neither the report nor the record tends to establish the fact that this situation on a particular division of a particular railroad in a particular year was typical, nor does the report or the record tend to show that the Commission could not have prevented such inequitable distribution of locomotive power.)

References are made to differences in practice on certain different railroads in the handling of private cars, (R. 52).

(These references throw no light on the legality of the practice prohibited by the Commission's order.)

During 1920 and in the summer of 1922, the Pennsylvania, the C. & O., and the L. & N. accorded to private car owners a greater use of facilities than they should receive, the extent of such greater use not being clearly established in the record. The conditions in 1922 were abnormal, due to the shopmen's strike and the coal miners' strike. Certain of the carriers, from motives of convenience, preferred to handle private cars. The report says that these abnormal conditions illustrate the natural effect of the assigned private car practice.

(The Commission's observations amount only to saying, "If we do not enforce the Act by preventing the unduly preferential enjoyment of other facilities by private car owners, then the natural effect of the practice of using private cars will be to give their owners such an undue preference." But the report does not say, and there is nothing in the record to sustain, the contention that the inequitable use which certain private car owners enjoyed during certain periods on portions of the Pennsylvania, C. & O., and L. & N. Railroads prevailed on other

railroads. Certainly, in the absence of proof the presumption is that the other railroads obeyed the law by refraining from giving unduly preferential use of other facilities to the owners of private cars. While the report speaks of the "inequitable" use of locomotive power by private car owners, the Commission refrains from holding that even the use of that facility in these specific instances was "undue" preference within the meaning of Section 3.)

The Commission says, "Any attempt on our part to mitigate the bad effects of such a practice is but temporizing. The private-car owner is either entitled to the preference to the full extent of the carrier's willingness to accept his cars or he is entitled to no preference whatsoever" (R. 53).

(This illustrates the Commission's fundamental misconception. It assumes that if a private car owner is permitted to use private cars he thereupon becomes "entitled" to the use of an unduly preferential proportion of the carrier's locomotives and other facilities. The Commission also assumes that any use by an owner of his private cars in times of car shortage in excess of his *pro rata* allotment of cars is as a matter of law *per se* unduly preferential. For example, there may be a shortage of system cars on railroad A on account of the inability of railroad B to return them, with the result that railroad A might have its tracks and locomotives almost completely idle, and yet the Commission assumes it would be *per se* unlawful for railroad A to handle available private cars in excess of the small *pro rata* of system cars available to other mines. But the true doctrine of the Act is that the exclusive use of private cars by their owners does not amount *ipso facto* to the extension by a

carrier of a forbidden discrimination to a shipper, because the advantage which the private car owner enjoys, where there is no shortage of railroad facilities other than cars, is an incidental advantage arising from ownership and from individual fortune, and is not an unlawful advantage or preference attributable to the unduly preferential transportation of such cars.)

The report refers to the contention of private car owners that the use of private cars during car shortage periods releases railroad cars for commercial mines. The report does not deny the correctness of this contention but claims that equality is vastly more important to the mine operator than a slight addition to his allotment of cars and that particularly in times of car shortage the mine operator is entitled to equality in the rationing of the transportation facilities at hand (R. 53-54).

(This comment rests upon the misconception that as a matter of law the Act prohibits, in time of car shortage, a private car owner from using his private cars beyond the same proportion which is available in respect of system cars to other mines. Yet for many years precisely this condition was treated as lawful by the Commission, and Congress has consistently denied the appeals of discontented operators and has thereby confirmed the Commission's construction that the practice was lawful.)

The report declares that except during car shortage periods the private coal car investment of about $30,000,000 is of no practical utility (R. 54).

(Since the order denies to the private car owner any benefit in time of car shortage, it follows that the order denies and was intended to deny any beneficial enjoyment of an important property right.)

The report states that since the Transportation Act empowers the coal consumer to demand adequate trans-

portation facilities, the situation is different from what it was prior to the Transportation Act (R. 54).

(The necessary inference from this is that prior to the Transportation Act the use of private cars was not an unlawful inequality to the disadvantage of mines not having adequate facilities; but that now such use of private cars has become an inequality because the Transportation Act has given the Commission the power to require carriers to supply adequate facilities. If the use of private cars involves as a matter of law an undue preference under Section 3, such a use was equally illegal prior to the Transportation Act. Moreover, prior to the Transportation Act the carriers were subject to their common law obligations to supply adequate equipment.)

The Commission then concludes that the assigned car rule both as to railway fuel cars and as to private cars is unjust and unreasonable and unduly and unreasonably preferential, and that all cars should be distributed on a *pro rata* basis; that if cars are assigned to any mine and placed thereat they should be so placed that every mine should receive the same pro rata.

(The effect is to immobilize, in times of car shortage, all private cars in excess of the *pro rata* unless those private cars are turned over to mines having no authority from the owners to use them.)

2. The Second Report.

Preliminary comments are made showing: that carriers do not contend for the right to assign cars for railroad fuel except when such fuel is bought upon long contracts covering six months or more (R. 85); that there are varying practices by the different carriers as to using or not using assigned cars (R. 85-93), (and this emphasizes the importance of the assigned car rule to many carriers, as well

as the variety of conditions); that the Associated Industries of Massachusetts appeared in support of continuing to place assigned cars in accordance with the directions of the owners, in order to enable New England carriers to secure regular and dependable supply of coal; and that organized mine labor and various coal operators' associations continued their opposition (R. 93).

The Commission indicates that evidence was introduced "to show the discriminatory effect, the resulting diminution in car supply at non-assigned car mines"; and the irregularity in working time during 1921, although a year of full car supply, claiming that such irregularity resulted largely from over-development "caused by the assigned car in the past" (R. 93-94).

> (The report does not claim that any of this evidence was different in kind or effect from that introduced on the first hearing.)

The report also indicated that there was evidence as to "the practicability of securing railway fuel of proper quality at reasonable prices without assigning cars", as to the amount of railroad fuel coal stored, and to the effect that the placement of assigned cars enabled the railroad to obtain cheaper fuel at the public expense, because increasing the cost at other mines (R. 93-94).

> (This emphasizes the reliance placed by the Commission upon the effects of the lawful practice of railroads buying and receiving their fuel at such mines as they may select in the exercise of their managerial discretion.)

The Commission's Authority.

The Commission then discusses certain legal propositions: It asserts a "broad authority", citing *U. S. v. New River Co.*, 265 U. S. 533; it denies that the handling of railroad fuel is not transportation in the sense of the Act; it denies that transportation of railroad fuel is not com-

merce, citing *Interstate Commerce Commission* v. *Illinois Central R. R.*, 215 U. S. 452, 472; it denies that such cars are outside the operation of Section 1 (12) of the Act (R. 94-96).

(The cases cited, we will show below, do not hold that the Act empowers the Commission to take cars away from transportation of railroad fuel simply because the sellers of such railroad fuel have the advantage of selling to a purchaser who can receive the coal in his own cars.)

The Commission considers the contention that there is no basis for finding undue prejudice under Section 3 because the assigned car mine is not in competition with the commercial mine, citing again the *Illinois Central case, supra.* The Commission claims that there is a competitive relation because at the end of the contract for railroad fuel the contract mine will be in better position because of better labor conditions and lower costs, and because, as to railroad owned mines, they often sell coal commercially or may be leased or sold to outside interests (R. 96-97).

(But even the competitive relation, if it in fact exists, does not make it unlawful for the carrier to buy and receive coal at such mines as it sees fit.)

The Commission points out that competition is not an essential element under Section 1 (R. 97).

The Commission suggests that the abolition of the assigned car practice merely carries out the *Traer* principle (R. 97).

(This is a fundamental misconception. The *Traer case* recognized the principle which always had existed that assigned cars ought to be placed in accordance with the direction of the owner.

The Commission's present position is in direct conflict with this principle. The *Traer case* indicated a just method of computing the extent of the need of a mine for system cars, and did not attempt

to prevent the use of assigned cars according to the direction of the owner.)

THE EFFECT OF ASSIGNED CAR RULE.

The Commission urges that the fundamental purpose of the Act is "absolute equality" as to treatment and enjoyment of facilities (R. 97); that the present practice diminishes the car supply at commercial mines, although the extent of diminution is in dispute and difficult to state, the American Railway Association claiming it makes a difference of about 3% and opponents of the practice claiming a much larger effect in the emergency period in 1922-23 (R. 97-99). After weighing the evidence, the Commission adheres to its former conclusion that the supply of cars at commercial mines would be increased by abolishing the assigned car practice, and that this appears also from the gross "inequality of treatment" between assigned car mines and mines without assigned cars, resulting in higher cost of operation and more unfavorable labor conditions at the latter. The Commission indicates somewhat more wastage during periods of car shortage at assigned car mines (R. 99-101).

(Thus the Commission shows it regards inequality in these respects as *per se* unreasonable and undue and rejects as necessarily unlawful that which it had upheld for 16 years and which Congress in 1920 had sanctioned accordingly. The Commission ignores the fact that to an important extent the inequality is merely incidental to legal situations which are sanctioned by the Act, and ignores the principle that corrective efforts should be directed only to the part, if any, of the practice that is illegal.)

The Commission indicates that its comments to the effect that any inequality is necessarily illegal *in toto*

applies to private cars as fully as to railway fuel cars (R. 100).

CONTENTIONS AS TO NECESSITY OF ASSIGNED FUEL CARS.

The Commission comments on contention of respondents that the practice of carriers buying and receiving their coal at such mines as they select enables the carriers to secure a regular supply of proper coal at reasonable prices. The Commission emphasizes that "the fundamental purpose of the Act is equality of treatment", which may not be violated merely because the carrier may operate at less expense (R. 101).

> (Thus the Commission indicates that it regards the prohibition of Section 3 against undue preference as operating to prevent a carrier from making and concentrating its coal purchases as it sees fit.)

The Commission indicates that *much* of the argument as to economy is due to the fact "that a carrier is able to secure cheaper coal as the result of discriminating in its own favor", (R. 101), (i. e. the Commission regards the carrier's selection of the mine from which it will buy, and receiving the coal at that mine when needed by the carrier amounts to "discriminating in its own favor").

The Commission indicates that carriers do not coerce the operators, but says the carriers are able to make contracts at somewhat lower prices. The Commission says that various carriers get along in purchasing their coal without resorting to such a practice and that various public utilities likewise do (R. 101-103).

> (The Commission thus indicates that there is no greater right in a carrier to purchase its own fuel at any mine it pleases and receive such fuel in its own cars when it needs it, ahead of the needs of shippers, than a public utility would have to do the same thing. That is, the Commission assumes that the purchase and reception of railroad fuel is con-

trolled to the same extent by the Act that the relative treatment of shippers is controlled by the Act.)

The Commission comments on evidence as to the methods whereby carriers could secure their fuel without the assigned car rule, including greater storage, and wider distribution of purchases (R. 103-105). The Commission states that the American Railway Association claims there would be an increased operating cost of $100,000,000 per year if the present practice were not employed, but says there was a failure of evidence to support this contention and says again that the practice increases the costs at commercial mines, and claims that the abolition of the present practice will cause carriers to store more coal and thereby get it more cheaply and make more equipment available for revenue service (R. 104).

(These comments assume that the Commission has a jurisdiction to determine the methods to be employed by carriers in purchasing and receiving their materials and supplies. The Commission assumes that any inequality arising from the present practice may rightfully be declared by the Commission as being illegal under any and all circumstances.)

The Commission, to support the idea that its view is not an unwarranted interference with the carrier's right to purchase, cites the *Illinois Central case, supra.*

(But this case merely drew the distinction between the right to buy, and the right to attribute a fictitious need for system cars to the mine from which the carrier had bought. The latter was a violation of the Act, while the former was not involved.)

Special Types of Equipment.

The Commission refers to special types of cars on the Hocking Valley and the Santa Fe, and also says that its order does not deny the advantage of using a particular type especially adapted for discharge of railroad fuel, al-

though the report seems to concede that the order may interfere substantially with such use (R. 104-105).

Railroad Owned Mines.

The report shows that 23 railroad companies own mines, 11 through subsidiaries which produce also commercial coal; and refers to varying methods of purchase by certain other carriers (R. 105).

> (These comments illustrate that the Commission assumes that it has power to substitute its judgment as to methods of purchase and handling of coal for the judgment of the carriers, as otherwise these comments are irrelevant.)

Private Assigned Cars.

The Commission again says that much of what it has said is applicable to private cars. Reference is made to the evidence introduced by the private car owners as to their individual situations and the economic necessity for the present practice. The companies thus appearing owned about 21,000 out of a total of 29,296 coal and coke cars privately owned. Certain New York public utilities introduced evidence as to the necessity of the practice. All the opponents of the railway fuel car opposed the private assigned cars except the National Coal Association. In addition the Harlan & New River Operators' Association opposed the private car practice (R. 106).

The Commission's Authority.

The Commission holds to the central idea that the carrier must at its peril see that the use of the private car does not permit a preference for its owner, and that the private car becomes in all respects as if it were one of the general stock and subject to the same liabilities and responsibilities (R. 106-107).

(Thus the Commission assumes that *any* inequality of access to *any* cars is an illegal preference, and announces that in point of law there is no qualification to the proposition that the private car shall be used precisely like the system car. This would mean that the placement of assigned cars in accord ance with the long standing practice has always been illegal and that the exclusive use of private cars by all other industries, which the Commission still permits, is also illegal. The Commission fundamentally errs in thus refusing to consider the circumstances under which the private car may be reasonably and justly used in time of car shortage.)

The Commission cites *U. S.* v. *B. & O. R. R.*, 165 Fed. 113, (the decision of the Circuit Court of Appeals in the *Pitcairn case*), to the to the effect that the carrier is obliged to make a fair and equal distribution of its entire equipment among all shippers similarly situated, and that the carrier cannot be relieved of this obligation (to give equal treatment to shippers similarly situated) by any arrangement for operating private cars (R. 107).

(The Commission by relying upon this case completely ignores the qualification "similarly situated".)

The Commission, conceding that this court did not in the *Illinois Central case, supra,* expressly pass upon the practice as to placement of private cars, claims the decision is authority for the proposition that it has the power to make the present order as to private cars, and cites the decision of the lower court in that case, *C. & A.* v. *Interstate Commerce Commission,* 173 Fed. 930, to the effect that the private cars must be treated as constituting a part of the carrier's available commercial equipment, and says this is the "fundamental principle" which has governed it (R. 108).

(Thus the Commission concedes fully that it has acted upon a principle, which can be demonstrated to be wholly unsound, i.e. that a private car may be taken away from its owner either through immobilization or diversion to another user without the consent of the owner and without any showing that in fact any violation of the Act is involved.)

The Commission comments further on the *Traer* and other similar cases and claims that the Act authorizes it to prohibit altogether the "preferential use" of assigned cars by the owners, and says the private car owner is "either entitled to the preference to the full extent" . . . "or is entitled to no preference whatever" (R. 109).

(These comments illustrate anew the Commission's misconception of the law. The *Traer* and other cases did not take from private owners the enjoyment of their cars. The Commission now assumes that the use of private cars in excess of the current *pro rata* is *per se* an illegally preferential thing. If so, all enjoyment by private car owners of their cars in excess of the current *pro rata* has been *per se* unlawful ever since the Act was passed, although the Commission has expressly approved such enjoyment until the present order.)

With reference to Section 1 (12) the Commission claims it is not limited thereby, citing *U. S.* v. *Pennsylvania Railroad*, 266 U. S. 191, (decided Nov. 17, 1924), indicating there was nothing in the Act to allow a carrier to create undue prejudice by the use of facilities possessed or to narrow the Commission's powers to prevent unjust discrimination (R. 109-110).

(The Commission here assumes that any enjoyment of private cars beyond the *pro rata* of all cars is necessarily an undue prejudice regardless of the circumstances.)

The Commission then discusses the contention that private car owners are entitled to the use of their cars unless this involves some preferential use of facilities other than cars. It cites *Rail and River Case*, 14 I. C. C. 86, to the effect that in event of shortage of general facilities, no operator has a superior right because he owns private cars, and it indicates that it said in that case that the shortage in other facilities "rarely, if ever, fails to accompany a shortage in cars" (R. 110-111).

(The Commission did not in the *Rail and River Case* say that car shortage was always coextensive with shortage of other facilities. If so, it would have overruled its decision in the *Tracy* and other similar cases, and indeed would have overruled the rule of the *Rail and River Case* itself, because therein the Commission stated that during car shortages the carrier "may not assign the private cars to operators other than their owners",) (14 I. C. C. 92).

The Commission then quotes two paragraphs from the American Railway Association Report bearing upon car shortages.

(The first of these paragraphs gives certain definitions and is wholly argumentative and contingent. The second paragraph is confined expressly to cases where "labor disturbances cause abnormal demands" and indicates that in such circumstances a congestion of tracks results in a car shortage. There is no statement that there is no car shortage without a corresponding shortage of other facilities or that no private cars in excess of the owners' *pro rata* of all cars can be moved without undue absorption of other facilities.)

The Commission adds that "locomotives, tracks, employees, terminal facilities", etc., are so related to the number of cars in service that an excessive demand for cars places an excessive burden upon such other facilities (R. 111).

(This observation while made in the most general terms cannot be universally true. The record shows without dispute that many car shortages arise because connecting railroads fail to return the particular carrier's cars. In such a case its tracks, locomotives and other facilities are actually idle because of a dearth of cars. In such circumstances the demand for cars whatever it is, is in excess of the supply, and yet in those circumstances such demand does not place an undue burden upon facilities other than cars. The Commission's observation is merely argumentative, sometimes true and sometimes not true. There is no evidence in the record to support such an observation if it be construed as a finding that in every instance every car shortage arises from a shortage of tracks, locomotives, etc., of the particular carrier on which such car shortage exists.)

The Commission referring to "some of the more aggravated cases of discrimination" says these "were during car shortages resulting in part at least from lack of motive power and limited track facilities". The Commission then refers to examples of experience on the L. & N. in a time of extraordinary transportation crises of 1920 and 1922-23.

(This emphasizes the fragmentary character of the proof and shows it cannot support a universal finding.)

(The Report as a whole makes it clear that the Commission never at any time gave consideration to the question of correcting any illegality arising through unduly preferential absorption of other facilities. The Commission merely reasons that, because this may be true more or less, the easy thing is to strike down the enjoyment of private cars in all cases.)

The Commission then says:

> "In determining upon a just and workable rule, we must recognize the fact that car shortages result from a general shortage in facilities, including terminals, motive power, etc., and that to permit private car owners to have their cars placed at designated mines in excess of the *pro rata* allotment means that private car owners will receive more than their fair share of those transportation facilities which they do not own, while to require *pro rata* distribution of cars is to bring about a just and non-preferential distribution in conformity with the fundamental requirements of the Act." (R. 111.)

(Thus the Commission speaks from the standpoint of its legal misconception. It has already claimed that there can be no just and non-preferential distribution of coal cars except one excluding private car owners from enjoying any of their private cars in excess of the general *pro rata*. Hence the Commission naturally proceeds to the view that any such excess will give the owners more than "their fair share" of other transportation facilities).

CONTENTION AS TO NECESSITY OF PRIVATE ASSIGNED CARS.

The report states that the private car owners introduced much evidence upon this point, some of which is summarized (R. 111-113). The report indicates that many of the private car owners secure large quantities of coal without the assigned car; that Norfolk & Western does not handle private coal cars; that many public utilities obtain their coal without private cars; that many mines produce coal in competition with that moved in private cars, and that many of the private car owners did not purchase their cars until the abnormal period following the termination of Federal control. (R. 114).

The Commission says that the private car owners say that only in a car shortage period is the ownership of private cars of moment and that the coal car shortages since 1916 have been abnormal and that for the future a condition of coal car surplus may be more regularly contemplated, and adds that this statement "is justified by the record" (R. 114).

The Commission says the fundamental problem is to determine whether differences in transportation conditions justify the inequality resulting from the assigned car rule and that the evidence of economic necessity does not justify "this inequality of treatment" (R. 114).

(Thus the Commission starts by assuming an illegal inequality of treatment without testing for the same by transportation standards. If the Commission's view were correct, that every inequality arising from the placement of private cars in excess of the owner's general *pro rata* was an illegal inequality it would necessarily follow that evidence as to economic necessity would be irrelevant.)

The Commission points out that in case of emergency, it may grant relief under Section 1 (15).

(But this does not justify the assumption that the power to correct an act in an emergency is in itself statutory authority to do that act.)

Extent of Discrimination.

The Commission refers to evidence as to adverse effect of the assigned car practice on the L. & N., C. & O. and Pennsylvania, stating that "during car shortage periods private car mines receive practically a full car supply, while other mines on the same division of the same railroad receive a comparatively small percentage of the cars ordered". The Commission says that private car owners often showed by their testimony the discriminatory effect, and that mines at which their cars were placed

were able because of better car supply to operate more regularly, at less expense, and with more efficient labor (R. 114).

> (The record shows that the evidence was not as broad as the Commission's observations, and the Commission refrained from any finding that there was undue prejudice in fact under Section 3 even in the cases testified to; but if such a finding had been made it would have had to be confined to not more than three carriers in one or two extreme transportation crises, and hence could not have sustained a universal order covering all carriers subject to the Act.)

The Commission refers to the fact that private car owners are willing to lose large amounts in operation of their cars in return for "preferential placement during car shortage periods" (R. 115).

> (Here the Commission again assumes that any use of private cars in excess of the general *pro rata* is necessarily an illegal preference regardless of circumstances.)

RELEASE OF SYSTEM CARS FOR COMMERCIAL MINES.

The Commission says the claim that the use of private cars releases system cars for commercial mines overlooks the fact that the operator is entitled to an equitable rationing of transportation facilities at hand and that "equality is vastly more important to him than a slight addition to his allotment effected by giving his neighbor competitor a better car supply" (R. 115).

> (Here again the Commission assumes that the Act requires an absolute equality in the distribution of cars regardless of difference in the circumstances.)

The Commission says that if private cars should be withdrawn and the remaining supply should be inadequate,

the Commission has power to require the carriers to furnish an adequate car supply (R. 115-116).

(But this has no bearing upon the question whether a use of private cars in accordance with the present practice and in the absence of unduly preferential absorption of other facilities is illegal.)

IMPAIRMENT OF INVESTMENT.

Commenting upon the contention of private car owners that prohibition of the present practice would take away the only advantage of private cars, the Commission says it does not find that the use of private cars should be prohibited and leaves owners free to continue to use their cars provided they do not exist thereby the *pro rata* share of all cars (R. 116).

(This does not adequately state the situation. The Commission has already declared that only in a car shortage period can the ownership of private cars be a matter of moment. It is emphasized that the object of the expense incurred by the private owners is to obtain the use of their cars during car shortages. Hence the Commission's order denies the use in those circumstances where it is of value.)

The Commission says that the fact that large sums may have been invested in reliance upon a rule which may become or be found unreasonable and unjustly discriminatory does not mean that it is powerless to change the rule, citing various cases, including *Louisville & Nashville Ry. Co.* v. *Mottley*, 219 U. S. 467, (R. 116).

(This of course is not open to dispute.)

(The Commission assumes throughout that any distribution of private cars in excess of *pro rata* is illegally preferential. This underlies all its consideration of extent of undue absorption of other facilities. The Commission nowhere recognizes that a duty rests on it to prevent, when and where it oc-

curs, an undue absorption of other facilities; but assumes such undue absorption occurs often and that the private car distribution in excess of *pro rata* is *per se* illegally preferential, and hence the only thing to do is to abolish that practice.)

LIKELIHOOD OF INCREASE IN NUMBER OF PRIVATE CARS.

The Commission reiterates the predictions in its first report, above referred to as being on page 51 of the Record (R. 116).

CONCLUSION.

The Commission reiterates its finding and conclusion.

3. The dissenting opinions.

Upon the delivery of the Commission's first report Commissioners Hall, Daniels, Potter and Cox dissented. Upon the delivery of the second report Commissioners Hall, Potter and Cox dissented. Commissioner Daniels was not at that time a member of the Commission.

Ordinarily a dissenting opinion develops a difference of view as to a matter within the scope of the Act, and on that account the dissenting opinion has no weight, because the view of the majority within the scope of the Act is authoritative.

But the dissenting opinions in this proceeding were different in that they were based largely upon the proposition that the majority of the Commission was proceeding upon a fundamental misconception of the Act, was going entirely outside of the Act and was interfering with rights with which the Act gave it no power to interfere. The dissenting opinions constitute emphatic statements of this view. The view of the majority that it is not going

outside of the scope of the Act is not binding upon the court. While the court can consider the reasoning of the majority upon this proposition, it is equally free to consider the reasoning of the minority to the effect that the Commission is exceeding its powers. In this view, therefore, the dissenting opinions are recommended to the consideration of the court.

Again, the majority based its opinions very largely upon broad questions of policy which we contend were for Congress to determine and not for the Commission to determine. In this aspect the views of the minority members upon these same broad questions of policy are of equal interest to the court as the views of the majority.

SUMMARY OF ARGUMENT.

THE RIGHT OF OWNERSHIP AND OF THE EXCLUSIVE USE OF PRIVATE CARS IS CLEAR AND THE ORDER OF THE COMMISSION CAN NOT BE SUSTAINED ON THE THEORY THAT, UNDER SECTION 1 OF THE ACT, THE COMMISSION CAN MAKE ANY ORDER, AFFECTING THEIR DISPOSITION AND USE, WHICH IT COULD MAKE AS TO THE PUBLIC CARS OF THE CARRIER.

The right of the owner to the full and exclusive use of his private cars existed at common law and does not spring from any rule or order of the Commission.

Prior decisions of the Commission recognize and protect the lawful right of the owner to the full and exclusive use of his private cars.

The Act recognizes the right of the owner to the full and exclusive use of his private cars; it does not declare that use unlawful.

The contention in the Commission's Brief that the Commission has power to treat private cars as system cars is not supported by the provisions of the Act or the decisions cited.

The legislative history of the Transportation Act and of subsequent bills relating to car distribution demonstrates that the law contemplates the use of private cars by their owners, and that Congress has steadfastly refused to legislate against that use.

THE ORDER CANNOT BE SUSTAINED UNDER SECTION 3.

It appears on the face of the report that in making its order the Commission found undue preference and prejudice to exist by applying standards of equality with respect to matters with which the Commission has no jurisdiction to deal; the order is therefore bad.

> The incidental advantages accruing to private car owners in respect of mine production, costs and labor conditions growing out of the placement and use of private cars do not constitute undue preference or give rise to undue prejudice.
>
> The Order, being equally against railroad fuel cars and private cars, and thus resting on some ground applicable to both, was never grounded on alleged undue absorption of other facilities, because that ground could not have any reference to railroad fuel cars.
>
> The only instances mentioned by the Commission of alleged undue preference in movement or in the use of other facilities relate to "certain" places on three railroads in the two most extraordinary transportation crises that have ever confronted the railroads.
>
> The Commission's general observations on the subject of "undue absorption" are predicated on the

theory that any disproportionate use of transportation facilities, growing out of the carriage of a larger volume of traffic for one than for another, irrespective of circumstances constitutes "undue" preference.

The Commission's own summation of the extent of the discrimination found shows that its findings of undue preference are based wholly on the incidental advantages, growing out of the inequalities in running time and in the volume of coal moved, by reason of the larger car supply at private car mines due to private car ownership and are not based upon any undue preference in movement or in the use of other facilities.

Mere inequality in the volume of traffic moved does not constitute undue preference or give rise to undue prejudice.

The Order cannot be sustained merely because an undue preference either may or is likely to arise.

The cases particularly relied upon by the Commission in its Reports as specifically indicating that its order is within the scope of the Act do not sustain the Order under Section 3.

The evidence relied on by the Commission to sustain the order likewise shows that the order was based on a fundamental misconception of the standards governing action under Section 3 and is wholly insufficient to sustain the universal order made.

THE ORDER CANNOT BE SUSTAINED UNDER SECTION 1 AS A REASONABLE RULE OF CAR DISTRIBUTION OR UPON THE GROUND THAT THE EXISTING RULE IS UNREASONABLE.

THERE WAS NO FINDING THAT THE ORDER, AS APPLIED TO PRIVATE CARS, WOULD INCREASE THE SUPPLY OF CARS AT SYSTEM CAR MINES NOR COULD THERE HAVE BEEN.

THE ORDER CAN NOT BE SUSTAINED UPON THE THEORY THAT PRIVATE CARS WILL BE RENDERED UNNECESSARY IN THE FUTURE THROUGH THE EXERCISE BY THE COMMISSION OF ITS POWER TO REQUIRE CARRIERS TO PROVIDE ADEQUATE EQUIPMENT OR OF ITS EMERGENCY POWERS UNDER PARAGRAPH (15) OF SECTION 1.

THE ORDER IS BASED SOLELY ON A CONSIDERATION OF CERTAIN ECONOMIC CONDITIONS OF A CHARACTER TOTALLY INSUFFICIENT IN LAW TO SUSTAIN IT AND OVER THE CORRECTION OF WHICH THE COMMISSION HAS NO JURISDICTION.

THE ORDER IS VOID BECAUSE ARBITRARY AND UNREASONABLE AND BECAUSE IT DEPRIVES PRIVATE CAR OWNERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

ARGUMENT.

POINT I.

THE RIGHT OF OWNERSHIP AND OF THE EXCLUSIVE USE OF PRIVATE CARS IS CLEAR AND THE ORDER OF THE COMMISSION CAN NOT BE SUSTAINED ON THE THEORY THAT, UNDER SECTION 1 OF THE ACT, THE COMMISSION CAN MAKE ANY ORDER, AFFECTING THEIR DISPOSITION AND USE, WHICH IT COULD MAKE AS TO THE PUBLIC CARS OF THE CARRIER.

1. The right of the owner to the full and exclusive use of his private cars existed at common law and does not spring from any rule or order of the Commission.

The right of a shipper to tender his shipment for transportation in his own vehicle is a very old one dating from the earliest days of railroad history. It is cited in the works of noted writers upon transportation:

Hadley; Railroad Transportation, Its History and Its Laws (G. P. Putnam's Sons, 1885), p. 150;

Noyes; American Railroad Rates (Little, Brown & Co., 1905), p. 6;

Johnson and Huebner; Railroad Traffic and Rates (D. Appleton & Co., 1911), Ch. XI.

It is a right expressly secured to shippers under the Pennsylvania Statute of April 13, 1864, P. L. 323, and upheld in *Logan Coal Co.* v. *Pennsylvania Railroad Co.*, 154 Fed. 497 (1907), where the Circuit Court for the Eastern District of Pennsylvania held that the defendant railroad was "obliged to transport merchandise in individual cars *when offered* by shippers." (Italics ours.)

In *United States* v. *Baltimore & Ohio R. R. Co.*, 154 Fed. 108 (1907); (165 Fed. 113 (1908); 215 U. S. 481 (1910)-), the circuit court for the District of Maryland reviewed the history of the use of private coal cars from 1852. It held that private cars should be counted in determining the distribution of system cars "not intending, however, to give to the relator, or those in like situation with him, in any event the use at any time of individual cars to the exclusive use of which other mine operators are entitled" (154 Fed. at 120).

These earlier decisions of lower courts are cited merely to show the long prevailing recognition of the use of private cars and of the right of the owner to their full and exclusive use.

This rightful use of private cars has never depended upon any rule or order of the Commission. It is derived from custom and the common law. It does not appear that there has ever been a time in railroad operation, either before the enactment of the Interstate Commerce Act in 1887 or since, when railroad companies were not free to

place private coal cars at coal mines in accordance with the direction of the owners of such cars even though there might be shortages of railroad system cars at other coal mines. In other words, the placement of private cars in accordance with the direction of the owner thereof has never been restricted by the Interstate Commerce Act and heretofore there has never been any attempt at such restriction by the Commission.* Examination of the decisions of the Commission relating to the general subject of car distribution will show that this right to the use of private cars has always heretofore been recognized.

2. Prior decisions of the Commission recognize and protect the lawful right of the owner to the full and exclusive use of his private cars.

The Commission itself has at all times heretofore recognized the lawfulness of this use of private cars by their owners. Even in its first report in the present case, the Commission said (R. 49):

> "The use of private cars by railroad carriers has been recognized by Congress, which has provided for the control of the use of such equipment by us, under the provisions of the interstate commerce act, by means of a mandate addressed to the carriers subject to our jurisdiction."

This use was expressly recognized in the earlier decisions of the Commission in the *Hocking Valley* and *Traer* Cases, *infra*, and the incidents of the use thus recognized were summarized by the Commission in *Hillsdale Coke &*

*(This, of course, is subject to the qualification that if by the use of private cars a mine should be given the enjoyment of other railroad facilities in such a way as to prevent other mines from enjoying the use of available system cars to a proportionate extent, such action would have been contrary to Section 3 of the Act. The Commission, however, never found it necessary to take any action to enforce this restriction, although all interests have conceded that the restriction exists.)

Coal Company v. *Pennsylvania R. R. Co.*, 19, I. C. C. 356 (1910) where the Commission said at page 358:

> "We also held that * * * all private cars owned by a particular operator, must be delivered to that operator, even though their number might exceed the ratable proportion of the particular mine in the distribution of available cars."

And again at page 370:

> "* * * in none of its decisions relating to coal-car distribution has the Commission undertaken to forbid the use of private cars by their owners, even though in a period of car shortage the number of cars owned by a mine may enable it to load daily more than the number of cars that it would receive if dependent solely on its share of system cars. On the contrary, the Commission has not only recognized the right of the carriers to move private cars, but has insisted that the owners may not be deprived of the use of their individual cars and that such cars may not be thrown into the general pool of system cars and thus be diverted to the use of other operators."

Concededly the right to use private cars, like any other right of a shipper may not be availed of under particular circumstances to effect an undue preference or any other violation of the Act. This is the legal limitation of all such rights and was correctly stated by the Commission as to the use of private cars in the earlier case of *Ruttle* v. *Pere Marquette Railroad Co.*, 13 I. C. C. 179 (1908), at page 185:

> "But while the right to use private cars may doubtless be denied to shippers *by appropriate legislation*, we are not prepared, in the absence of a specific enactment to that effect, *to say that their use is in itself unlawful.* Whether *under a given set of circumstances* their use results in an *unlawful advantage* to their owners and in an unlawful disadvantage to others is another question, which

> under existing legislation is clearly under the control of the Commission, and may be made the basis of such relief as *the facts in any particular case* may justify." (Italics ours.)

The Commission has thus recognized the true rule as laid down by this court that, in the absence of such collateral results, the use of private facilities and the incidental advantage denied therefrom are entirely lawful.

> "The statute must be taken as a legislative recognition of the long-continued practice and a declaration that the incidental advantage derived by the owner was not undue." (*Union Pacific* v. *Updike Grain Co.*, 222 U. S. 215.)

The *Updike* case and the similar case of *I. C. C.* v. *Diffenbaugh*, 222 U. S. 42, are discussed in detail under Point II of our Argument.

3. The Act recognizes the right of the owner to the full and exclusive use of his private cars; it does not declare that use unlawful.*

The right to the full and exclusive use of private cars as it prevailed at common law received the general protection of Section 22 of the Act, which expressly saves all common law rights. No subsequent amendment to the Act has destroyed it.

Until 1906 the Act contained no specific provision directly applicable to private cars. In that year the Commission in its 19th Annual Report to Congress recommended certain amendments to the Act.

One of the proposed amendments, which later became paragraph (13) of Section 15 of the Act, related to cars and other facilities furnished by shippers for the

*Paragraph (12) of Section 1 is discussed separately under 4 (*d*) *infra*.

transportation of their own shipments. Commenting upon this proposed amendment, the Commission said:

> "We do not at this time recommend that carriers should be prohibited from using private cars.
>
> * * * * * * *
>
> "It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We hesitate to recommend at this time so drastic a measure as that. Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Moreover, there are many instances in which the service can be rendered of the facility furnished more advantageously both to the shipper and railway, and without injury to the public, if provided by the shipper himself."

The amendment as passed is now paragraph (13) of Section 15 of the Act giving the Commission power to fix the maximum allowance to be paid to any shipper who furnishes any facility or service for the transportation of his own property. It is discussed in detail *infra*.

In *United States v. Pennsylvania Railroad Co.*, 242 U. S. 208 (1916), the Supreme Court expressly referred to the language quoted above from the Commission's 19th Annual Report to Congress and pointed out that none of the amendments of 1906, not even those broadening the provisions of Section 1 so as to make the term transportation include "all instrumentalities of shipment or carriage" abolished the private car. On this latter point, the Supreme Court quoted the following language of the Commission (p. 220):

> "The term 'instrumentalities of shipment or carriage' as found in the first section of the statute,

> of course, includes cars, but they are such cars as are provided by the carrier or used by it in interstate commerce * * *."

At page 230 of its opinion, the Supreme Court said:

> "There was some sentiment outside of the Commission for the abolition of the private car system, but abolition was not attempted. It would have been a short cut to the solution of the problems and could easily have been accomplished by requiring the railroads to furnish all of the equipment necessary for taking care of all kinds of traffic. But neither the Government nor the Commission contends for such an extreme, * * * ."

It is true that the amendments of 1917 and 1920 to the Act place upon each railroad subject to the Act the duty "to furnish safe and adequate car service" but the duty to furnish "*all* of the equipment" in the sense that the railroads and they alone shall furnish cars has never been enacted. It seems clear that the phrase "all of the equipment" above quoted was used by the Supreme Court in this sense.

After the passage of the amendments of 1906, to the Act, the Commission in 1907 in its report to Congress "On Discriminations and Monopolies in Coal and Oil" expressly recommended at page 81:

> "That after reasonable time, carriers engaged in interstate commerce be prohibited from using 'individual' or 'private' cars for the hauling of coal traffic, etc."

Congress did not then take and has never taken the action recommended, although the Commission once recommended and the Supreme Court in *U. S.* v. *Pennsylvania R. R. Co., supra,* pointed out how the result might be accomplished.

4. The contention in the Commission's Brief that the Commission has power to treat private cars as system cars is not supported by the provisions of the Act or the decisions cited.

(*a*) General Discussion of the Commission's Position.

Despite this holding in *U. S.* v. *Penn. R. R. Co., supra,* and despite the subsequent inaction of Congress, the Commission now undertakes to sustain its revolutionary order in the present case by asserting that because private cars are operated on the railroads and the carrier pays an allowance for them, such cars become a part of the equipment of the carrier in the complete sense and, therefore, may be dealt with in all respects if actually owned by the carrier and as if the private owner had no right therein.

This doctrine has never been asserted before and is at variance with everything which the Commission has done or the courts upheld.

It runs counter to the established rule that the owner of a private car has a right to damages if his car is diverted from his use.

> *Gustavson* v. *Michigan C. R. R. Co.,* 296 Ill. 41, 129 N. E. 516 (1921);
> *Empire Refineries Co.* v. *Guaranty Trust Co.,* 271 Fed. 668 (C. C. A. 1921);
> *Francesconi* v. *B. & O. R. R. Co.,* 274 Fed. 680 (Dist. Ct. 1921).

It runs counter to the express provisions of Section 15 of the Act (hereinafter discussed) recognizing the right of a shipper to furnish instrumentalities for the transportation of his own property, and to the rule of this Court in the *Diffenbaugh* and *Updike* cases, *infra,* that the incidental advantage thereby derived is not unlawful.

It runs counter to the express recognition in the *Traer*, *Hocking Valley* and *Hillsdale* decisions of the Commission, *supra,* as affirmed by this Court in the *Illinois Central* case, *supra,* that the owner of private cars is entitled to their exclusive use regardless of a contemporaneous shortage of system cars.

If this startling new doctrine is sound as applied to the 29,000 private coal cars now in its service it would obviously have equal application to the 230,000 private cars of other kinds now in use. It would thus destroy at a single blow the only beneficial use by the owners of upwards of $250,000,000 worth of private property.

We do not mean to imply that the use of private cars is exempt from proper regulation by the Commission. Concededly the Commission has a regulatory power over their use and can make appropriate regulations, consistent with the owner's right of ownership and exclusive use, whenever necessary to remove some violation of the Act.

But the order herein involved confessedly goes beyond the proper exercise of any such power and with sweeping universality abolishes the use of private coal cars at all times and under all circumstances in excess of the *pro rata* allotment of system cars. Conscious that such an order cannot be sustained under Section 3 (hereinafter discussed under Point II of this Argument) or under any proper application of Section 1 with due recognition of the owner's right to use his cars under principles heretofore approved by this Court in the *Illinois Central* case, *supra,* counsel for the Commission have taken their stand squarely upon the revolutionary doctrine that private cars are public cars. They have thus recognized what becomes increasingly clear from a study of the Commission's reports, that unless this doctrine can be sustained the Commission's order must fall. With the legal issue thus squarely drawn we will proceed to a detailed discussion of the contentions advanced in the Commission's brief.

(*b*) PARTICULAR CONTENTIONS ADVANCED IN THE COMMISSION'S BRIEF.

The Commission at page 69 of its brief advances the following contention:

> "The Commission in prescribing a rule of car distribution had power to treat private cars on the same basis as system cars, even if it had not found that placement of private cars at mines under the assigned car rule deprives other mines of labor and facilities to move system cars."

Under various subheadings in support of this point the Commission relies upon certain provisions of the act and two decisions of the Supreme Court. None of these support the contention.

On pages 74 and 75 of its brief the Commission points out that the original definition of "transportation" in Section 1 of the Act was confined simply to "all instrumentalities of shipment or carriage."

The brief then makes the following statement (p. 75):

> "In 1906 the definition of 'transportation' was enlarged in order, among other things, to make certain that private cars should be subject to the provisions of the act. Thus 'transportation' was defined as including 'cars * * * irrespective of ownership or of any contract, express or implied, for the use thereof.'"

If by this language the Commission means that the owner of a private car is not entitled to its exclusive use, the statement is directly at variance with the interpretation which this Court placed upon this precise provision in its decision handed down in 1916 in *United States* v. *Pennsylvania Railroad Co.*, 242 U. S. 208, 220, quoted above. This Court there plainly held that the "instrumentalities" there referred to were confined to the public cars of the carriers and that Congress had not abolished the "private car system" or "turned an accepted custom

into a delinquency." In the face of this plain construction of the provisions by this Court there is no warrant for the statement in the Commission's brief (p. 74) that this amendment of 1906 "shows that Congress intended that the Commission should have power to treat private cars on the same basis as system cars."

The next provision of the act relied on in support of this contention is paragraph (13) of Section 15, adopted in 1906, giving the Commission power to fix the maximum allowance to be paid for a facility furnished by *"the owner of property transported."* The brief states that (p. 75):

> "Congress in this way made plain that private cars should have the same legal status under the Act as system cars * * * ."

The language of Section 15 (13) makes plain precisely the contrary. It is as follows:

> "If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

So far as it is applicable to cars this provision by its language is confined to a car furnished by "the *owner* of property transported" and used in "*such* transportation," i.e., in transportation of the private car owner's own property. Thus the Commission is empowered to fix merely the *maximum* allowance, lest too high an allowance might

cloak a rebate. All of this plainly indicates the intention of Congress that private cars should be used solely for the shipments of their owners. It negatives any intention that they "should have the same legal status * * * as system cars."

This Court in *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46 (1911), construed this language as a plain recognition by Congress of the right of a shipper to furnish his own private car for the transportation of his own property:

> "* * * the act of Congress in terms contemplates that if the carrier receives services from an *owner of property transported*, or uses instrumentalities furnished *by the latter*, he shall pay for them. That is taken for granted in section 15, the only restriction being, that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of June 18, 1910, c. 309, Section 12, 36 Stat. 539, 551)." (Italics ours.)

There is no warrant in the face of the foregoing language, and the judicial construction of it, for the assertion in the Commission's brief (p. 75) that by enacting it Congress

> "made it plain that private cars should have the same legal status under the Act as other cars."

The two decisions of the Supreme Court cited in the Commission's brief in support of the assertion that the Commission has power "to treat private cars on the same basis as system cars" are: *Ellis* v. *I. C. C.*, 237 U. S. 434 (1914), and *Chicago Refrigerator Co.* v. *I. C. C.*, 265 U. S. 292 (1923). Neither of these cases had any relation to car distribution.

In the *Ellis* case it appeared the Commission had instituted an investigation involving refrigerator car lines. In the course thereof it directed certain inquiries to an

officer of Armour Car Lines, a New Jersey corporation. He refused to answer. The Commission petitioned the District Court to make him answer. The District Court refused the prayer of the petition and the case came to the Supreme Court on appeal. The sole question involved was the right of the Commission to compel answers. Armour Car Lines was not a shipper. It appeared that its principal business so far as cars were concerned was the building of cars which it leased to railroads for their general use as part of their public equipment, or to shippers for their private use. It also performed icing in transit under contracts with the carriers. As to these aspects of its business the Supreme Court held the Commission had no power to require information from Armour Car Lines nor any jurisdiction over their transactions.

> "But the only relation that is subject to the Commission is that between the railroads and the shippers. It does not matter to the responsibility of the roads whether they own or simply control the facilities, or whether they pay a greater or less price to the lessor."

But the Commission contended that there might be some relation between Armour Car Lines and Armour & Company, the latter a large shipper, and that, if so, the payments to the former might, if too high, cloak a rebate to the latter, and would be within the scope of Section 15 (13). The Supreme Court held that the Commission had jurisdiction to inquire into the relations between Armour Car Lines and Armour & Company to ascertain whether Armour Car Lines was "merely the tool of Armour & Company."

The case thus draws a sharp distinction between cars leased to the carriers for general purposes and cars furnished directly or indirectly by a shipper for the transportation of his own property. The former are public facilities in the hands of the carrier. The latter are

private cars, and the allowance paid the shipper for them is subject to inquiry and regulation under Section 15. It is idle to assert that this case holds that private cars are a part of the carrier's public car supply. It holds just the contrary.

And the decision further holds that even where private cars are furnished under Section 15 of the Act, the Commission must limit its investigation to the reasonableness of the charge or allowance for such cars and may not inquire further into the general conduct and financial results of the car owner's business or any "other matters belonging to the private business of the Armour Car Lines."

In this connection the court stated at page 445:

> "* * * it is to be observed that not every advantage that may inure to a shipper as the result of the position of his plant, his ownership or his wealth is a preference. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46."

Thus, so far as private care are concerned, the Ellis case merely affirms the rule of the Diffenbaugh case and was subsequently cited by the Court in support of this rule in *U. S.* v. *Illinois Central R. R. Co.*, 263 U. S. 515, 524 (1923):

> "It is true that the law does not attempt to equalize opportunities among localities (*Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46, 56 L. Ed. 83, 87, 32 Sup. Ct. Rep. 22); and that the advantage which comes to a shipper merely as a result of the position of his plant does not constitute an illegal preference (*Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445.)"

The case of *Chicago Refrigerator Co.* v. *I. C. C.*, 265 U. S. 292 (1923), quoted and discussed at length at pages 80 and 81 of the Commission's brief involved a car owning and leasing company whose arrangements with the rail-

roads were quite similar to those of the Armour Car Lines. However, the Refrigerator Company was neither itself a shipper nor connected with one through intercorporate relations. It simply leased refrigerator cars to the railroads for public use and then acted as the railroad's agent in soliciting business. The cars were patently not facilities furnished by the "owner of property transported" for use in "such transportation." On the contrary, they were acquired by the railroads for public use and were public cars just as much as though the railroads had owned them in fee or acquired them under an equipment trust. The Supreme Court thus properly said of these cars:

> "The cars are rented to railroads. They are subject to the control of the latter and are to all intents and purposes their property during the period of the lease."

The decision is no authority whatsoever for the contention that the private car of a shipper furnished, under Section 15 of the Act, for the transportation of his own property only becomes thereby a public railroad car.

At page 57 of the Commission's brief the following contention is advanced:

> "Many decisions of this court show that the Commission, under its authority to prescribe reasonable and nonpreferential coal-car distribution rules, may require private cars and cars for railway fuel to be distributed on a *pro rata* basis."

In support of this contention the following decisions of this Court are cited:

> *Morrisdale Coal Co.* v. *Penna. R. R. Co.* 230 U. S. 304;
>
> *Interstate Commerce Commission* v. *Illinois Central Railway Co.* 215 U. S. 452;
>
> *Penna. R. R. Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 121;

Penna. R. R. v. *Steinman Coal Co.*, 242 U. S. 298;
Penna. R. R. Co. v. *Clark Coal Co.*, 238 U. S. 456;
Penna. R. R. Co. v. *Minds*, 250 U. S. 368;
Penna. R. R. Co. v. *Webber*, 257 U. S. 85;
U. S. v. *New River Coal Co.*, 265 U. S. 533;
U. S. v. *Penna. R. R. Co.*, 266 U. S. 191.

An examination of these cases shows that no one of them is authority for the contention in support of which they are cited.

The *Morrisdale case* turned entirely upon a question of jurisdiction. The court there held that the Commission has exclusive primary jurisdiction to pass upon car distribution rules and that a suit for damage because of alleged discrimination in such rules cannot be maintained in the first instance in court.

The *Puritan* and *Steinman cases* hold simply that a state court may entertain a suit for damages based upon a railroad's disregard of its own car distribution rules. The court pointed out that as the rules themselves were not attacked no administrative question, requiring a prior determination by the Commission was involved.

The *Clark* case holds that if a complainant has secured and order from the Commission condemning the railroad's car distribution rules as unlawful, the complainant must seek damages either before the Commission or in a Federal court and cannot sue in a state court. Thus this case is purely a jurisdictional case.

The *Minds* and *Webber* cases were simply suits in a Federal court to recover the amount of reparation already awarded by the Commission.

The case of *United States* v. *Pennsylvania Railroad Company* is the York switching case and has no bearing whatever on any phase of car distribution.

In the *New River* case the court upheld a rule prescribed by the Commission with reference to the distribution of *system* cars to mines served by two railroads. No

question whatever as to assigned or private cars was involved in this case.

Considered together these cases, insofar as they relate at all to car distribution, establish the well recognized rule that the prescribing of car distribution rules is a matter involving administrative discretion and is thus within the primary jurisdiction of the Commission. They do not establish the proposition for which they are cited

> "that the Commission * * * may require private cars * * * to be distributed on a *pro rata* basis."

(*c*) THE ILLINOIS CENTRAL CASE.

The remaining case relied on by the Commission in support of the assertion of the power to treat private cars as system cars is *United States* v. *Illinois Central*, 215 U. S. 452, in which the court reviewed in part the order of the Commission in the *Traer case*. Some preliminary reference to the decisions of the Commission in the *Hocking Valley* and *Traer cases* is therefore required to a complete understanding of the *Illinois Central case*.

First it should be borne in mind that the *Hocking Valley* and *Traer cases* dealt primarily with the distribution of system cars. Private cars were considered only for the purpose of determining the proportion, if any, of system cars which private car mines should receive in times of a system car shortage. Both cases (the earlier and leading case, the *Hocking Valley* case, in express terms) expressly recognized the right of the private car mine to the full and exclusive use of all private cars on hand. Their distribution was taken into account only for the purpose of determining the proper distribution of available system cars as between private car mines and system car mines. The power now asserted, viz., the power to make any order governing the distribution of private cars, which it might make concerning system cars was not asserted by the Commission in either of these cases or raised before this court

in the *Illinois Central case*. On the contrary, the Commission's decisions clearly negatived this power and were based on the contrary and true rule that private car owners are entitled to the full and exclusive use of their private cars. This statement alone is sufficient to show that the *Illinois Central case* is not authority for the contention now made.

Further consideration of the practices out of which the *Traer* and *Hocking Valley cases*, and hence the *Illinois Central case* arose, and of the purpose of the Commission's orders in these cases, will show that there is nothing in the reasoning either of the Commission or the court in those cases supporting the Commission's present contention. On the contrary, such reasoning and purposes lead to the opposite conclusion.

In a general way it may be said that it has always been the practice of railroad companies, in times of car shortage, to distribute system cars in proportion to the proper relative needs or demands of the various mines. For this purpose each mine has always been given a "rating" of a certain number of cars per day intended to represent its physical capacity to produce and ship coal. With a 50 per cent. car supply a mine with a rating of 100 cars was thus entitled to receive 50 system cars. Thus 50 cars represented the relative legitimate demand for system cars of that mine on that day. But prior to 1907 many carriers, in applying this *pro rata* rule for the distribution of system cars, took no account of the fact that the legitimate demand of a mine using private cars (or assigned fuel cars) might have been satisfied, in whole or in part, by such cars. Obviously a proper demand for cars, once satisfied, cannot be made the basis of a second and duplicate demand for cars. Yet, prior to 1907 on many railroads the private cars (and assigned fuel cars) available and actually used by a particular mine were not "counted against" that mine in determining its legiti-

mate demand or need for system cars. Thus under this earlier practice a particular mine could satisfy its proper demand or need for cars, in whole or in part, by using its private cars (or assigned fuel cars) and then have that same demand or need filled a second time out of the available system cars, thus reducing the number of system cars received by the other mines.

In *Railroad Commission of Ohio* v. *Hocking Valley R. R. Co.*, 12 I. C. C. 398 (1907), and in *Traer* v. *Chicago & Alton R. R. Co.*, 13 I. C. C. 451 (1908), the Commission held that this practice of not "counting" private cars (and assigned fuel cars) against the mine receiving them resulted in an undue preference to any such mine and an undue discrimination against mines dependent upon system cars. That is, the practice condemned, permitted the assigned car mine to demand and receive system cars upon the basis of a fictitious "need" for cars already once satisfied in whole or in part. To remove the discrimination and preferences incident upon this former practice the Commission, in the *Hocking Valley* and *Traer* cases, held:

> (1) That all private cars and assigned fuel cars should be placed at mines owned or designated by the owner to the full extent available whether or not cars so placed exceeded the current pro rata allotment of system cars;
>
> (2) That all private and assigned fuel cars so placed at a mine should be counted against that mine's pro rata allotment (i.e., legitimate demand or need) with the result
>
> (*a*) that if such private and assigned cars so placed equaled or exceeded any such mine's distributive share of cars at the prevailing rate of car distribution it should receive no more, and
>
> (*b*) if such private and assigned cars so placed were less than the mine's distributive share it should receive only enough system cars to bring its total up to its distributive share.

In order to arrive at the prevailing percentage of car supply a formula was adopted wherein the total of system cars, private cars and assigned cars ready for placing was recognized as the total of available cars and used as the basis for computing the percentage of distribution.

Thus the requirement of "counting" private and assigned cars in the calculation and charging them against the mine to which they were assigned was simply a method of ascertaining, *first,* the relative total legitimate demand or need of each mine for cars and, *second,* the extent to which such demand or need of a particular mine had been satisfied or met by the use of private or assigned cars. Thus the true subject matter with which the Commission dealt in the *Hocking Valley* and *Traer* cases was the ascertainment of the ultimate legitimate demand or need of each mine for system cars, and throughout its treatment of this subject matter the Commission recognized the fundamental fact that private and assigned cars must be placed at the mine designated by the owner and not otherwise. This was in truth a part of the underlying premises of the situation dealt with by the Commission.

This analysis and comment upon the *Hocking Valley* and *Traer* decisions applies equally to the decision in the case of *Hillsdale Coal & Coke Co.* v. *Penn R. R. Co.,* 19 I. C. C. 356 (1910). The only new question in that case was whether the private and assigned cars received by a mine should be counted against its *pro rata* allotment under the prevailing percentage of car distribution or against its rated capacity to produce and ship coal. The Commission adhered to its rule under the *Hocking Valley* and *Traer* cases that such cars should be counted against the distributive share (and not against the rated capacity), thus again recognizing the prevailing distributive share as the measure of the total relative legitimate demand or need of a particular coal mine for cars on a particular day. The language used by the Commission in the *Hillsdale* decision leaves no doubt that here again the

right of a mine to receive all of its private and assigned cars was recognized as an essential premise of the situation. After referring to its *Hocking Valley* and *Traer* decisions the Commission said at page 358:

> "We also held that * * * all private cars owned by a particular operator, must be delivered to that operator, even though their number might exceed the ratable proportion of the particular mine in the distribution of available cars."

And again at page 370:

> " * * * in none of its decisions relating to coal-car distribution has the Commission undertaken to forbid the use of private cars by their owners, even though in a period of car shortage the number of cars owned by a mine may enable it to load daily more than the number of cars that it would receive is dependent solely on its share of system cars. On the contrary, the Commission has not only recognized the right of the carriers to move private cars, but has insisted that the owners may not be deprived of the use of their individual cars and that such cars may not be thrown into the general pool of system cars and thus be diverted to the use of other operators."

Only that part of the Commission's order in the *Traer case* requiring that railway fuel cars be "counted" in determining the relative distribution to be made of system cars as among assigned car and system car mines was involved in *Interstate Commerce Commission* v. *Illinois Central, supra.* That part of the order requiring a similar counting of private cars for like purpose, and like purpose only, was not appealed. Even the limited extent to which the order in these cases dealt with private cars was therefore neither before this court nor passed upon by it in the *Illinois Central case.*

Furthermore the court in that case, of course, did not undertake to make a "rule" of car distribution on its own account. Neither did it undertake to affirm something which the Commission had not done and had denied the power or intention of doing, *i. e.*, a prohibition of the use of private cars. All the court did do was to affirm an order of the Commission requiring carriers to remove the discrimination which patently resulted from a practice permitting a particular mine to satisfy its legitimate demand or need for cars by the use of its private or assigned cars and then have that same demand or need filled a second time from the supply of system cars.

The order of the Commission in the *Hocking Valley-Traer* cases did not undertake to regulate the distribution of private cars. It dealt only with the distribution of system cars. Its purpose was to protect system car mines against any unfair distribution of system cars. These are the only cars which the system car mine has any right to use or in which it has any interest. It has no right to the use of private cars or any interest therein. It is clear that the rule then established by the Commission achieved the result sought, if not, it is within the power of the Commission to make any change in the rule necessary to this result. To cite the *Illinois Central* case, affirming the *Hocking Valley-Traer* rule, in support of a power in the Commission, now for the first time asserted, to require private cars "to be distributed on a *pro rata* basis", or for the power "to treat private cars on the same basis as system cars", is to cite that case for precisely what it did not hold.

The order does not require private cars to be distributed to other mines. On the contrary, it recognizes that such distribution may not be required, but that the owner is entitled to their exclusive use. This in itself destroys the contention that the Commission may make any order for the distribution and use of private cars that it could of public cars. It may, of course, make any order necessary

for the removal of undue preference or to establish a reasonable practice under the standards of Section 1, but such orders must be consistent with the right of ownership and use and must be judged by the standards of Sections 1 and 3 as are other orders. The argument of the Commission appears to reduce itself to the following contentions:

(1) Section 1 authorizes the Commission to make reasonable rules of car distribution.

(2) This is a rule of car distribution.

(3) It is a reasonable rule of car distribution because so declared by the Commission.

Of course, the order may not be supported on any such reasoning. It is subject to review in the same way that every other order of the Commission made within its administrative jurisdiction is subject to review. Under succeeding points we shall undertake to show that the order is not supported under either Sections 1 or 3. If not, it clearly cannot be sustained merely because the Commission is empowered to fix reasonable rules of car distribution any more than an order of the Commission establishing a reasonable rate or requiring the removal of undue preference may be supported upon the ground that the Commission is authorized to make such orders. All must be tested under the standards of Sections 1 or 3.

5. The legislative history of the Transportation Act and of subsequent bills relating to car distribution demonstrates that the law contemplates the use of private cars by their owners, and that Congress has steadfastly refused to legislate against that use.

The only remaining reliance of the Commission in support of its asserted power to declare the use of private cars unlawful *per se* under Section 1 and "to treat private

cars on the same basis as system cars" is paragraph 12 of Section 1 which was added to the Act in 1920. The Commission does not, however, contend that this paragraph requires a mathematically equal distribution of all cars public and private. In their original report (R. 29) they hold precisely the contrary and in their brief (p. 105) all they assert is that the provision together with certain others shows

> " * * * the intention of Congress to vest in the Commission more fully than ever before administrative powers to deal with the difficult and complicated problems of car distribution."

Prior to its first report in the present case, however, the Commission had held that this paragraph had the effect of enacting into law the old Assigned Car Rule so as to give statutory force to what had previously been approved as a lawful administrative regulation. This view has been adopted by a number of United States District Courts. If it be the correct view, as we believe, then the order of the Commission is patently unlawful because in direct conflict with the statutory rule adopted by Congress.

In direct conflict with the effect ascribed by the Commission to paragraph 12 of Section 1 is the argument advanced in the brief for the United States that this paragraph should be interpreted as a statutory requirement of a mathematically equal distribution of all cars. In the opening portion of the Commission's first report (R. 19 to 29), the Commission presents in detail the reasoning and authorities in support of its contrary conclusion. In addition to what it there said, we desire to call attention to the following circumstances bearing upon the construction of Section 1 (12).

While the Transportation Act of 1920 was before Congress, a determined effort was made by certain coal operators not having private cars to induce Congress to re-

quire by legislation a strict day to day *pro rata* distribution of all cars irrespective of ownership. The abolition of private coal cars by Legislative act had theretofore from time to time been urged upon Congress (Nineteenth Annual Report of Interstate Commerce Commission 1906, Special Report of Interstate Commerce Commission on Discriminations and Monopolies in Coal and Oil January 25, 1907), but Congress has declined to take this step, and the fact that the abolition of the private car system had not been attempted by Congress had been commented upon by the Supreme Court prior to consideration of the Transportation Act in *United States* v. *Pennsylvania Railroad*, 242 U. S. 208, decided in 1916. Indeed, the right of ownership in such cars is expressly recognized in the Interstate Commerce Act. When the Transportation Act was before Congress, the right to ownership of private cars had thus been fully recognized, and the Hocking Valley and Traer rule, whose operations as above described were well understood, had been in effect for many years, had been established by the Commission as a reasonable and nondiscriminatory rule for car distribution, and had been sustained by the Supreme Court of the United States. Under these circumstances the bill out of which the Transportation Act grew, as it passed the Senate (S3288), included (no doubt in deference to the representations made by such coal operators), a section dealing with coal car distribution, wherein it was provided:

> "* * * that no cars shall be furnished to or used by any mine for the transportation of coal during a car-shortage period in excess of the proportionate distributive share of such mine, regardless, in either case, of who the consignor or consignors, or the consignee or consignees or the owner or owners of the coal loaded or to be loaded in such cars may be, or of the purpose for which such coal may be used or intended, or of the ownership of such car or cars."

The corresponding Bill in the House, on the other hand, contained what is now paragraph (12) of Section 1 of the Interstate Commerce Act, reading as follows:

> "(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine."

In this amendment the House had adopted the language of the Commission in the Hocking Valley and Traer decisions. The House Committee, with which this Bill originated, had before it at the same time the Senate Bill containing the provision above quoted. With these two bills before it the House Committee summoned Commissioner Clark, to whom the Chairman of the Committee indicated the foregoing section of the House Bill as one which "seeks to carry into law the orders of the Director-General now with reference to car distribution". Mr. Clark, in response to questions from the Chairman, said he thought that the rule then in effect (the Hocking Valley-Traer rule) was the right rule, that it had "stood the test of adjudication at the hands of our Commission and at the hands of the Supreme Court of the United States". In reporting the Bill the House Committee (House Report No. 456, page 27, Sixty-sixth Congress, First Session) thus described paragraph (12) of Section 1 as above quoted, and as now contained in the law:

> "Paragraph 12 of the amended section incorporates in the statute a rule laid down by the Commission and upheld by the Supreme Court as to just

> and reasonable distribution of coal cars among the mines, thus avoiding any possibility of the recurrence of the evil of what is known as assigned cars."

The Bill was adopted by the House as reported, and the Conference Committee subsequently agreed to paragraph (12) of Section 1, declaring the Traer rule, and rejected the proposal of the Senate for strict *pro rata* distribution of all cars, including private cars. The Conference bill was subsequently adopted by both houses.

Thereafter, the Senate, whose bill for equal distribution of all cars had been rejected, called upon the Commission to inform it upon what authority it permitted cars to be distributed in accordance with the Hocking Valley-Traer rule, to which the Commission replied that in its opinion paragraph (12) of Section 1 was a statutory enactment of the *Hocking Valley-Traer* rule, and that car distribution in accordance therewith was in all respects lawful. *In re Assignment of Freight Cars*, 57 I. C. C. 760. Thereafter, in June, 1921, a bill was introduced in Congress construing paragraph (12) of Section 1 as requiring a strict *pro rata* distribution of all cars, but was never reported out of Committee, and no other action has been taken by Congress since the above report was made by the Commission to the Senate.

Congress thus expressly refused to adopt the new rule of distribution now required by the order of the Commission. On the contrary, it enacted in terms the Commission's previous requirement that all cars placed should be "counted against the mine". The sole purpose of this requirement, as shown above, was to bring about a fair distribution of system cars. It in no wise affected, nor was it intended to affect the right of the private car owner to the full and exclusive use of private cars. In rejecting the proposal for equal distribution of all cars, private or system, Congress must be regarded as having rejected the rule proposed. In adopting the language of the Commission's

previous orders, it cannot be held to have intended to accomplish more by this amendment to the statute than was accomplished by the previous order of the Commission, whose language was adopted. It is therefore clear that the Commission's conclusion that paragraph (12) of Section 1 does not require equal distribution of all cars, public and private, is correct, and that the contention now advanced by the United States and by the intervening appellants is erroneous.

Whether the effect of paragraph (12) of Section 1 is likewise to adopt the Commission's rule in the *Hocking Valley* and *Tracy cases* in its entirety, under which the right to the full and exclusive use of all assigned cars was recognized, is discussed in the railroad's brief in case No. 606. We will not extend this brief by further discussion of it here.

In considering the effect of Section 1, and particularly of paragraph (12) thereof, upon private cars and the Commission's power over them there is a provision in paragraph (15) that is of great importance. The pertinent portion of paragraph (15) is as follows:

> "(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership *as between carriers* of locomotives, cars, and other vehicles, during such

> emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable;"

The obvious intent of Congress in enacting this provision was to arm the Commission fully and adequately to deal with transportation emergencies. And it may fairly be assumed that its provision for this purpose represents the limit of its willingness to confer upon the Commission power over the subject in question. Yet even in such case it was careful by limiting words *"as between carriers"* to withhold from the Commission power to interfere with the right of the private car owner to use his cars. The District Court has so interpreted this paragraph (Akron R. 60).

> "in paragraph (15) their use is excluded from the power conferred by Congress upon the Commission to make directions with respect to car service by confining its power in making such directions to car service without regard to the ownership of cars as between carriers;"

We understand that this exclusion of private cars from the Commission's emergency powers is conceded. In the light of this, how can it be contended that Congress intended to give the Commission in normal times a power over private cars which it expressly withheld even in emergencies?

In conclusion upon this point of our argument, we submit:

That the full and exclusive use of private cars by their owners has the sanction of law;

That the Commission cannot declare it unreasonable or unlawful *per se;*

That private cars may not be treated by the Commission "on the same basis as system cars," and

That therefore the order cannot be sustained upon the theory that because private cars constitute a part of the carrier's equipment, the Commission can make any order, affecting their distribution and use, which it could make concerning equipment owned by the carrier.

POINT II.

THE ORDER CANNOT BE SUSTAINED UNDER SECTION 3.

While the Commission's brief rests its defence of the order largely upon the contention that under Section 1 it may make any rule governing the distribution of private cars which it could make with reference to public cars, a consideration of both reports shows that this contention is now put forth largely as an afterthought and that the order is in reality based solely upon certain preferences and advantages found to accrue to private car owners by reason of the ownership and use of private cars. No independent investigation into the reasonableness of the order under Section 1 was made. Whether the claim of power under Section 1 rests upon its requirement that all rules and practices shall be just and reasonable, or whether it rests upon the power to establish reasonable rules of car distribution, an analysis of the reports will show that the only circumstances which the Commission took into account as bearing upon the lawfulness of the existing practice were the preferences and advantages noted above. The order was thus in reality based on Section 3.

1. It appears on the face of the report that in making its order the Commission found undue preference and prejudice to exist by applying standards of equality with respect to matters with which the Commission has no jurisdiction to deal; the order is therefore bad.

(*a*) INTRODUCTORY STATEMENT.

Section 3 does not declare all preferences and advantages to be unlawful, irrespective of circumstances, but only those which are *undue*.

The preferences or advantages found must therefore be such as, under the standards created by Section 3, constitute undue discrimination. A carrier may not be held guilty of undue discrimination because of some act performed by another carrier, to which its operations are unrelated. *Central RR. of N. J.* v. *United States*, 257 U. S. 247 (1921). Even where discrimination widespread in extent is found to exist, the scope of the Commission's order may not exceed the discrimination shown and be extended to places or localities where there is no evidence of undue discrimination. *Wisconsin Rate Cases*, 257 U. S. 563 (1922); *New York* v. *United States*, 257 U. S. 591 (1922; *American Express Co.* v. *Caldwell*, 244 U. S. 617, 627. The order is universal in scope. It applies at all times, under all circumstances, on all railroads and at every place on every railroad. The preferences or advantages found must therefore be universal in extent, arising from the existence of facts universally present. The only such facts found by the Commission, or indicated in its report, are:

First, that to the extent that the private cars received by a private car mine exceed the system cars received by a system car mine of similiar capacity, a larger proportion of the output of the former than of the latter has been and will be moved;

Second, that by reason of such relative movement system car mines are at certain disadvantages in respect of mine production, labor conditions and mine costs.

The first is a self-evident fact. The second are merely the incidental advantages accruing to the private car owner by reason of the ownership and exclusive use of private cars.

(*b*) THE INCIDENTAL ADVANTAGES ACCRUING TO PRIVATE CAR OWNERS IN RESPECT OF MINE PRODUCTION, COSTS AND LABOR CONDITIONS GROWING OUT OF THE PLACEMENT AND USE OF PRIVATE CARS DO NOT CONSTITUTE UNDUE PREFERENCE OR GIVE RISE TO UNDUE PREJUDICE.

Perhaps ninety per cent of the testimony before the Commission, much of the report and a substantial part of the respondent's brief are devoted to the development of this phase of the case and to a discussion of the conditions in the coal industry. The Commission finds that mine capacity is largely in excess of consumptive demand (80 I. C. C., at 535; R. 40-41), that the industry is overdeveloped, that there is a surplus of mine labor, and that the mines least economical to operate are closed in times when cars are plentiful, but open up in periods of peak demand, so that "the paradox is presented that as the car supply becomes worse the capacity of the open mines increases at even a greater rate," increasing distribution and diminishing efficiency in movement (80 I. C. C., at 547; R. 40).

It thus appears from the report that the overdevelopment of mines is the primary cause of car shortages. Under such conditions it is self-evident that with an entirely normal use of railroad facilities private car owners who, like appellees, have supplied themselves with an equipment sufficient to meet their maximum needs, will have available for loading a larger proportion of their requirements than are available for mines dependent upon system cars. It is equally self-evident that under such conditions the working time of such private car mines will exceed that of commercial mines, and in the original report (R. 36) it is said that the opponents of the assigned car rule object thereto, among other reasons, because "it produces great and harmful inequalities in working time in nearby competing mines." The matter is further discussed in the first report wherein the Commission finds that labor

conditions are worse and costs of operation higher at commercial mines because of inequality in running time due to shortage of system cars (80 I. C. C. at 550-1; R. 43-44).

It is again dealt with in the second report in a number of places, the Commission saying (R. 115):

> "* * * During car-shortage periods mines at which their cars were placed were able because of better car supply under the assigned-car rule to operate more regularly, at less expense, and with more efficient labor organization than such mines were able to operate with system cars only and than other mines similarly situated on the same railroads and depending entirely upon system cars were able to operate."

Clearly all advantages of this description, whatever their extent, are due primarily to the fact that the private car owner has undertaken to protect himself against recurring car shortages through the ownership of private cars. They are thus merely the incidental advantages of the ownership of transportation facilities sanctioned by law.

The order applies when motive power and the other facilities are sufficient to move all cars on hand, as well as when they are not. It may not be, therefore, doubted that its primary purpose was to remove these resulting inequalities in labor and other mine conditions, irrespective of preference in movement. But the law does not attempt to equalize fortunes, opportunities or abilities, or to confer power upon the Commission so to do, and incidental advantages derived by the owner of transportation facilities do not constitute an undue preference or advantage and may not be made the predicate for an order under Section 3. *Interstate Commerce Commission* v. *Diffenbaugh*, 176 Fed. 409, 222 U. S. 42, 46; *Union Pacific* v. *Updike Grain Company*, 222 U. S. 215.

These cases related to the payment of elevator allowances for the elevation and transfer of grain in transit,

and have interesting analogies to the present case. To begin with, the Commission upheld the contract between the carrier and the elevator, whereby the elevator was allowed a compensation for the elevation service, notwithstanding the fact that the elevator had the privilege of performing at the same time incidental services of value in the case of its own grain, which it might happen to elevate, such as cleaning, clipping, mixing, etc. (In this case, in the *Hocking Valley-Tracr* case the Commission recognized the right of the private car owner to the exclusive use of all available cars, notwithstanding the incidental advantages derived therefrom.) The Commission reported its action in the elevator cases to Congress. Thereafter Congress, knowing of the incidental advantages which an elevator in such position could enjoy in connection with its own grain, which it happened to handle, sanctioned the payment to shippers of an allowance for elevation services. (In this case Congress, with full knowledge of the assigned car rule and its incidental advantages, sanctioned the continued use of private cars and refused to prohibit their placement in excess of the number of system cars at system mines.) Subsequent to its earlier decisions in the elevator cases the Commission began to change its mind. It first reduced the amount of the allowance and then prohibited the payment of any allowance for the elevation of the shipper's own grain, if the shipper also performed in regard thereto any of the other services, such as cleaning, clipping and mixing. The Commission did this with the idea that otherwise there was an absence of equality between grain owners generally and the grain owner who had an elevator, possessing such a contract with the carrier, and by reason thereof derived commercial advantages incidental to the ownership of such transportation facility.

In *I. C. C.* v. *Diffenbaugh, supra*, both the District Court and this Court held that such incidental ad-

vantages do not constitute undue discrimination and are not the evidence thereof. The District Court, speaking through Judge SANBORN, said:

> " * * There is no more power in the commission to forbid carriers from paying or allowing for the elevation and transfer of grain in transit reasonable compensation because there is a possibility that a future violation of the law may arise out of such an allowance than there is to prohibit carriers from charging and receiving reasonable rates for transportation of all property, because there would be less danger of future rebates and discriminations if they were compelled to conduct transportation without compensation.
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> * * * * * * * * * *
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> "It is no part of the duty, nor is it within the power, of the commission to see that all shippers of like commodities derive the same measure of profit from their trade in and treatment of the articles which they ship, to see that a shipper who owns a warehouse, an industrial track, and private cars derives no greater profit from dealing in the groceries or other articles he ships than a shipper who has none of these facilities, to see that a shipper of coal who owns a tipple from which he loads it gains no greater profit from the handling of his coal than one who loads in from a wagon. *Harp* v. *Choctaw, Oklahoma & Gulf R. Co.*, 125 Fed. 445, 61 C. C. A. 405. Pecuniary advantages derived by shippers from the ownership or use of such facilities of trade are attributable to that ownership, and not to the transportation of the articles shipped, and the consideration and regulation of these advantages are without the scope of the commission's power." (p. 419.)

In affirming the decision of the District Court, this Court said:

> "We agree with the court below that this decision is erroneous in its conception of the grounds on which under the statute an advantage may be

pronounced undue, and in its assumption that Congress has left the matter open by merely permissive words. The principle as to advantages is recognized in *Penn Refining Co.* v. *Western New York & Pennsylvania R. R. Co.*, 208 U. S. 208, 221. The law does not attempt to equalize fortune, opportunities or abilities. * * * * * " (p. 46.)

Speaking again on the same subject, in *Union Pacific* v. *Updike Grain Co., supra*, the Supreme Court said:

> " * * * The statute must be taken as a legislative recognition of the long-continued practice and a declaration that the incidental advantage derived by the owner was not undue." (p. 219.)

When the *Diffenbaugh* case was decided the Act (Section 1) defined "transportation" as follows:

> " * * * the term 'transportation' shall include . . . all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported;" (222 U. S. 44).

Transportation is still defined in the same language (see present Act, Sec. 1, paragraph (3)). Thus in the *Diffenbaugh* case the service of elevating grain was "transportation", under the definition found in the Act at that time. Similarly the private car is "transportation" under the same definition. But in the *Diffenbaugh* case the court held, that the mere advantage that the owner of the private elevator got through the commercial advantage, derived from the elevation service for which he was compensated by the railroad did not itself amount to a forbidden discrimination (undue preference). Similarly the mere advantage that the owner of private cars gets through being allowed their exclusive use, when such cars are

available for placement does not in and of itself constitute an unjust discrimination and an undue preference.

To the extent, therefore, that the order is based upon incidental advantages in mine production, labor conditions, mine costs, etc., growing out of the ownership and use of private cars, the Commission applied an improper standard under Section 3 and proceeded upon a misconception of its powers.

The correctness of the doctrine, upon which we here rely, that undue prejudice and undue preference must be determined solely by the application of transportation standards was recently recognized by this court in *United States* v. *Illinois Cent. R. R.*, 263 U. S. 515. In that case the court stated:

> "It is true that the law does not attempt to equalize opportunities among localities, *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46; and that the advantage which comes to a shipper merely as a result of the position of his plant does not constitute an illegal preference. *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445. To bring a difference in rates within the prohibition of §3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard" (p. 524).

While in the case just cited the court considered rates rather than a practice, such circumstance does not make the principle expressed in the case the less controlling on the case at bar.

There is only one consideration that may possibly be relied upon to differentiate the case at bar from the *Diffenbaugh* case. It is urged by the Commission, in effect, that equality in distribution of all available coal cars in times of car shortage, regardless of their ownership, is required as a means of preventing unjust preference and undue prejudice, because private cars when distributed exclusively to their owners, results in an undue absorption of other transportation facilities. We shall now address ourselves to this contention.

(c) THE ORDER, BEING EQUALLY AGAINST RAILROAD FUEL CARS AND PRIVATE CARS, AND THUS RESTING ON SOME GROUND APPLICABLE TO BOTH, WAS NEVER GROUNDED ON ALLEGED UNDUE ABSORPTION OF OTHER FACILITIES, BECAUSE THAT GROUND COULD NOT HAVE ANY REFERENCE TO RAILROAD FUEL CARS.

In dealing with the Commission's argument that it is entitled to make its order against private cars on the ground that the use in times of car shortage of private cars in excess of the general pro rata allotment involves an unduly preferential absorption of railroad facilities other than cars, we wish first to challenge the correctness of the implication which the Commission thus seeks to make that it based its order as to private cars on any such ground. We assert with confidence that no such ground was or could have been the basis of this order because it is evident beyond any dispute that the Commission in making this order was actuated by considerations of such a fundamental character that they applied not only to private cars but to railroad fuel cars. The Commission made precisely the same order against the railroad fuel cars that it made against the private cars. Its report shows that it made this order because it believed that any inequality in advantage could be treated by it as a violation of the Act and it believed that the inequality arising from a coal mine being able to sell and deliver coal to a railroad company for its fuel and to load it in cars furnished for that specific purpose by the railroad company was precisely similar to the inequality enjoyed by another coal mine able to sell and deliver its coal and to load it into private cars specifically supplied to that mine. In other words, there was a single underlying motive for the Commission's order that was to eliminate these two inequalities different in name but similar in effect because the Commission believed

they tended to prevent the mines from enjoying equality of conditions as to labor, cost of operation, etc. If the order as to private cars was based on the unduly preferential absorption of other facilities, upon what was the order based as to railroad fuel cars? The Commission does not venture to suggest that there is an excessive absorption of the use of railroad locomotives, track, etc., when a railroad company concentrates its coal purchases at one mine and that this excessive absorption would be avoided if the railroad company dissipated its purchases among fifty mines. Of course exactly the opposite is the fact. The more the railroad company concentrates its coal purchases the more it can economize in the use of tracks, locomotives, etc., and the more it spreads these purchases among a great many different mines, with resulting loss of time and efficiency in car movement, placement, etc., the more it wastes the use of its locomotives, tracks, etc. If it be assumed that the order against private cars was based on an undue absorption of other facilities than cars, then we have the paradoxical situation that the Commission makes an order with exactly the same effect against railroad fuel cars and private cars and yet professes to base the order as against private cars upon a desire to avoid the wastage of the use of locomotives, and tracks, while its very same order against railroad fuel cars will have exactly that effect.

It is clear, therefore, that the alleged unduly preferential absorption of other railroad facilities by the allotment of more than the *pro rata* of private cars cannot be the foundation of this order. We shall proceed to show, however, that there would be no basis for the claim that the order could be sustained against private cars on the ground of alleged undue absorption of other facilities, even if such argument were not destroyed by the fact that the order works in precisely the opposite way in the case of railroad fuel cars.

(*d*) THE ONLY INSTANCES MENTIONED BY THE COMMISSION OF ALLEGED UNDUE PREFERENCE IN MOVEMENT OR IN THE USE OF OTHER FACILITIES RELATE TO "CERTAIN" PLACES ON THREE RAILROADS IN THE TWO MOST EXTRAORDINARY TRANSPORTATION CRISES THAT HAVE EVER CONFRONTED THE RAILROADS.

In its original report, in dealing with three carriers only, the Commission said (R. 53):

> "The record indicates that during 1920 and the summer of 1922 *certain* carriers, particularly the Pennsylvania, Chesapeake & Ohio, and the Louisville & Nashville, accorded to private-car owners a greater use of their facilities than they should properly receive. *The extent to which this was done, however, is not clearly established of record. The conditions of the past year were abnormal.* The carriers' locomotives, due to the shopmen's strike, were in poor condition. The strike in the bituminous coal fields made a heavy demand for coal from the nonunion fields, a large part of which are located upon the lines of the three carriers mentioned, and taxed the carriers' facilities. The termination of the coal strike increased the demand for coal, with a resulting greater burden upon the carriers' already overtaxed facilities. In the congestion when the carriers were unable to transport promptly all traffic offered them, *certain* of them did prefer the handling of private cars from motives of convenience. These cars were usually moved in train lots in shuttle service, and avoided the additional switching and spotting service necessary in furnishing a like amount of transportation to the numerous mines shipping commercial coal in system cars. The *abnormal* conditions of the summer of 1922 illustrate the *natural* effect of the assigned private car practice under conditions which should call for the utmost consideration of all shippers in order that the transportation disabilities of the carriers should be borne as equally as possible. Coal in private cars under the present arrangements is susceptible of easier movement than similar shipments in rail-

road cars because it usually moves regularly between the same points in large or trainload lots. *This merely indicates the greater likelihood* that such cars will receive preferred treatment."

The record will not support a finding that these lines or any of them, either habitually or generally, gave preference to the movement of private cars, nor indeed does the foregoing quotation from the report so state. The most that can be said for this paragraph of the report is that *certain* of these three carriers (which ones not being stated) at *certain* times and places during the abnormal conditions resulting from the miners' and shopmen's strikes, gave preference to the movement of private cars. Even if the foregoing paragraph amounted to a specific finding that these three carriers habitually and generally gave preference to the movement of private cars in the period named, the paragraph itself shows upon its face that the conditions referred to were abnormal, and the combined result of the miners' and shopmen's strikes. The report itself characterizes them as *abnormal*. Surely a finding professedly predicated upon abnormal conditions is not sufficient to justify the making of an order even as against these three carriers, operative in times of what may be called normal car shortages, that is to say, periodic shortages growing out of seasonal and peak demands for coal or out of conditions of traffic congestion local in character.

As to all other carriers, the finding is purely speculative and conjectural. It amounts to no more than a suggestion that because, under abnormal conditions, one or more of these three carriers gave some undue preference to the movement of private cars, other carriers may do so. Neither here nor elsewhere in the report is there any finding that any other carrier, even under the abnormal conditions present at the period referred to in the foregoing quotation, gave any undue preference in movement to private cars or failed to ration such facilities as might be at

hand equitably among coal shippers. Yet the order runs against every coal carrying road in the United States. As to the conditions on most roads there was no evidence whatsoever. As to others there was affirmative and uncontradicted evidence that no preference whatsoever had been accorded to private cars, and the use of other facilities.

Although a large amount of testimony was taken between the first and second reports, the second report contains no additional finding of any undue preference either in the movement of private cars or in the use of other facilities, but again refers to the condition on these three railroads.

The findings of the Commission on this matter of preferential use of other facilities are remarkably fragmentary both in time and place. Its references on this point are to conditions existing on parts of three railroads, (Louisville & Nashville, Chesapeake & Ohio, and Pennsylvania), in the two periods of the most extraordinary conditions of transportation crises which have ever confronted the railroads, these being two periods of post-war readjustment in 1920 and in 1922-23, both of which were so extraordinary that the Commission had to exercise its newly conferred emergency powers (First Report, R. 53; Second Report, R. 111-114).

Clearly the above finding is insufficient to support an order of universal application.

(c) THE COMMISSION'S GENERAL OBSERVATIONS ON THE SUBJECT OF "UNDUE ABSORPTION" ARE PREDICATED ON THE THEORY THAT ANY DISPROPORTIONATE USE OF TRANSPORTATION FACILITIES, GROWING OUT OF THE CARRIAGE OF A LARGER VOLUME OF TRAFFIC FOR ONE THAN FOR ANOTHER, IRRESPECTIVE OF CIRCUMSTANCES, CONSTITUTES "UNDUE" PREFERENCE.

In its second report the Commission seeks to find some support for the order by the incorporation of two paragraphs of a report of the Committee of American Railway Association to the United States Coal Commission, inserted

in the record at the second hearing. These paragraphs read as follows:

> "'Coal Car Shortages', while a term generally used, is commonly a misnomer; 'Transportation Shortage' would be more exact or more properly descriptive. From the viewpoint of the mine management a 'car shortage' exists when cars are not placed on mine tracks in sufficient quantity to fill car orders. From the viewpoint of the railroad management the situation may rather be considered a 'Transportation Shortage', for at such a time there may exist no 'car shortage' on the railroad as a whole. That is, even though all car orders are not filled there may be in the road's possession as many coal cars in the aggregate as in previous periods when the mines it served loaded a greater amount of coal and the needs of such mines for cars were more adequately or fully met.
>
> "When labor disturbances cause abnormal demands for coal to be delivered in certain sections of the country within a certain period, the coal moves to meet these demands via routes and gateways in quantities far above the normal, or average, movement through such channels and also via unusual routes. Because of this abnormal coal movement, yard tracks, main tracks, terminals, lake and tidewater piers and various other facilities become overtaxed or congested, with a consequent slower movement and longer turn-around of cars. This results in what the mine management terms a 'car shortage.'" (R. 110.)

While the Commission did not claim that these quotations constituted substantive evidence, and while they were obviously incompetent as evidence to support the order, it may be added that the paragraphs on their face show that they would not constitute substantive evidence of any fact even if they had been made and sworn to by a witness before the Commission. The first paragraph is exclusively argumentative, discussing what is the broader and better definition of the condition generally referred to as a car

shortage and pointing out what "may" happen in event of car shortages. The second paragraph is confined entirely to cases "when labor disturbances cause abnormal demands for coal" (the Commission's order is of course far broader than this contingency), and after all amounts to nothing beyond a general observation that the abnormal coal movement in such a time results in overtaxing facilities *certain* facilities in certain sections and via *certain gateways,* with consequent slower movement. It refers to movements of abnormal quantities of coal via unusual routes and gateways to lake ports or tidewater terminals causing congestion there and a slower return of cars to the coal regions. In such a situation the tracks and yards adjacent to the coal mines are not congested. They are usually empty, and the motive power there is usually idle. Suppose in such a case appellee, the Public Service Corporation, for example have a number of private cars which it desires to load with coal at mines on the Monongahela Division of the Pennsylvania Railroad and ship to its plants in New Jersey, or that any of the appellees has private cars, which it wishes to load on such division and ship to its own plant east or south of the mines and where there is no congestion either at the terminal or en-route. Can they lawfully be denied this privilege because of congestion at Ashtabula, Cleveland or some other Lake Erie port located at the north or west? The congestion and power shortage which the excerpt deals with are notably local and unusual and far removed from the mines or from the portions of railroad over which the private cars may move. The excerpt thus refutes rather than supports the Commission's sweeping finding here under discussion. Even if a witness had sworn to these statements before the Commission, they would constitute no evidence that it is the universal or even general rule that in all car shortages of all kinds, including that recurring sort which is due to a great expansion of orders for cars, the use of private cars

by their owners in excess of *pro rata* allotment involves undue absorption of other facilities which otherwise could and would be used by other mine operators. After quoting from the report of the American Railway Association Committee as above, the second report continues:

> "As we pointed out in the *Rail & River case*, 'A shortage in cars usually if not invariably is accompanied by a shortage in some one or more of the other facilities of the carrier.' Locomotives, tracks, employees, terminal facilities, etc., are so related to the number of cars in service that an excessive demand for cars places an excessive burden upon such other facilities. Some of the more aggravated cases of discrimination shown under the assigned-car rule were during car shortages resulting in part at least from lack of motive power and limited track facilities. Some of these cases were cited by private-car owners as examples of the necessity of the assigned car. As illustrative of this, the United States Steel Corporation, International Harvester Company, Chicago By-Product Company, and Ford Motor Company, through subsidiary companies, operate large mines in the Harlan district of the Louisville & Nashville in Kentucky, and severally own about 4,000 private cars used in serving their respective mines. The evidence shows that this carrier was unable, because of limited track facilities among other things, to handle all the cars required by the mines in this district, and yet private-car mines received practically full car supply while other mines in the district received less than a 30 per cent supply for substantial periods. Other divisions of the same railroad not only had a larger percentage of cars than the Harlan district, but at times during the car shortage it was shown that this carrier notified connections not to deliver empty cars to it.
>
> "In determining upon a just and workable rule, we must recognize the fact that car shortages result from a general shortage in facilities, including terminals, motive power, etc., and that to permit

> private-car owners to have their cars placed at designated mines in excess of the *pro rata* allotment means that private-car owners will receive more than their fair share of those transportation facilities which they do not own, while to require *pro rata* distribution of cars is to bring about a just and nonpreferential distribution in conformity with the fundamental requirements of the act." (93 I. C. C. 731-732, R. 111.)

The fact that the Commission says that "*some* of the more aggravated cases of discrimination * * were during car shortages resulting, *in part at least,* from lack of motive power and limited track facilities," clearly indicates that the Commission's conception of "discrimination" is not confined to cases arising from preferential use of other facilities, of which there may be a shortage. It is also significant that the only case referred to as illustrative of the condition described is that arising on one of the three roads which the Commission in its first report said had given undue preference to the movement of private cars at *certain* times and *places* in 1920 and 1922 when other facilities were short. Insofar as the last paragraph is based upon the illustration given, it is on its face based upon an unusual and exceptional condition, as indicated by the prior report of the Commission itself. Insofar as the last paragraph is a general observation, it is wholly unsupported by the record if it is intended as a finding that car shortages always result from a shortage of facilities. We do not think it is so intended.

Assuming, however, that the foregoing statement constitutes a definite finding that a car shortage always results from a general shortage of facilities and that such finding is supported by the evidence, it is still inadequate to support the universal order made unless accompanied by a further finding that under such circumstances all carriers habitually give undue preference to private cars in the use of such other facilities, or that it is impossible for them

to do otherwise. There is no such finding. The only instances relied on by the Commission in this connection relate to certain carriers and to certain times and places during the two most extraordinary transportation crises that have ever confronted the railroads, one in 1920 in the period of post-war adjustment, and the other in 1922, at the time of the shopmen's strike, gave undue preference to the movement of private cars.

The foregoing observation of the Commission amounts, thus, to nothing more than a statement of the self-evident fact that if a greater proportion of the coal of one shipper is moved than of another, the former has received relatively more transportation.* That it is this and this alone which the Commission regards as involving the use by private car owners of "more than their fair share of those transportation facilities which they do not own," is further evidenced throughout the Commission's reports.

That the Commission's general observations on the matter were not intended as a specific finding that there could never be a coal car shortage at any place, under any circumstances, or for any cause other than a general shortage of other facilities, or that if it did, such finding is untenable is clearly established by at least two statements of the Commission itself.

In *Car Supply Investigation*, 42 I. C. C. 657 the Commission, reporting on the car shortage of 1917, stated that the prime reason of that shortage was the failure of connecting lines to return cars to the line originating the traffic. A car shortage so caused may or may not be accompanied by a general shortage of other facilities on such connecting lines, but certainly is not either caused or accompanied by a general shortage of other facilities on the originating line. Yet in case of a coal car shortage so caused the order of the Commission forbids the originating

*We will deal below more fully (9) *infra*, with the proposition that mere inequality in volume of service does not constitute unjust discrimination.

line, either to move the full available supply of private cars, of the private car mine's requirements, from a mine on its line to a plant likewise located on its line and thus never leaving its rails, or to move such private cars to the owner's plant on some connecting line, and on which there is neither congestion nor shortage of power and which promptly returns all cars delivered to it, both system and private.

Secondly in this very case it appears on the face of the report that the primary cause of a coal car shortage is the over-development of the industry, and the fact that in a time of seasonable or peak demand for coal the car orders placed, based on the rated capacity of the mines, greatly exceed actual consumptive demand. That is to say, in the rush for cars at such times, mines place car orders for their full productive capacity, in order to get the largest possible share of cars in distribution. This practice does not grow out of the Assigned Car Rule or out of the use of private cars or out of a shortage of other facilities, but out of conditions in the coal industry, and out of the rules governing mine ratings and car orders.

Furthermore, any finding by the Commission that there may be no car shortage at any place on any line, unless accompanied by a shortage of other facilities, or that where so accompanied, any placement and movement of private cars anywhere in excess of system cars involves undue preference in the use of other facilities, would be clearly untenable on its face. While any finding of the Commission is entitled to great weight, as coming from an expert tribunal, no finding even of such a tribunal may stand, if contrary to obvious physical facts of general knowledge. The Court will take judicial notice that a general shortage of facilities when it occurs does not operate equally at all points. One railroad may be free and another congested. One division on a single railroad may be running smoothly and another blocked. One yard may be congested and another normal. One connecting line may be

able to dispatch its traffic promptly and return cars without undue delay, while another may not. One consignee may unload promptly and another hold a car under load for several days. One shipper (in this case a mine owner) may be sending his output of fifty cars to fifty different destinations or consignees, each encountering a variety of physical and transportation conditions en route both under load and on return of the car, while another may send his total output, likewise consisting of fifty cars, to a single consignee or a single destination, encountering physical and transportation conditions on the way entirely different from those surrounding the movement of a large proportion, or all, of the fifty cars going to scattering destinations and consignees. All these things affect prompt return of cars, and hence car supply. In short, even during a general shortage, one shipper's traffic may be subjected to a variety of delays to which another shipper's traffic is not subjected, not on account of undue preference in movement but because of differences in the physical situations encountered on the several railroads, over which their respective shipments move, or on the several parts of the same railroad. These differences in condition alone are sufficient to account in many instances for a larger proportionate supply of private than of system cars for a loading at any given time and place. Any sweeping finding that there may be no car shortage for any cause other than a general shortage of facilities would be clearly contrary to the obvious physical facts. So would be a finding when there is a shortage for any cause, any movement of private cars anywhere necessarily involves undue preference in the use of other facilities, unless it be true that the mere fact of such greater movement alone constitutes an undue preference. Yet the order of the Commission forbids the use of the full available supply of private cars at any time and place unless the supply of system cars is proportionately equal thereto.

While it is our purpose to confine this part of the brief to a consideration of things appearing upon the face of the Commission's report, it may not be inappropriate to conclude our comments on the Commission's general observation that the movement of private cars involves an undue absorption of other carrier facilities in times of car shortage by reference to testimony of one of the principal witnesses in the case. It will be remembered that in the next to the last quotation from the Commission's report, in which this observation is made, the situation on the Harlan District of the Louisville & Nashville, where the United States Steel Corporation and other designated private car owners are said to have received practically a full car supply under the abnormal conditions existing in 1920 and 1922, while commercial mines received less than a 30% supply in certain periods, is referred to as an illustration, and the only illustration of the Commission's general observations in this regard.

Mr. Eugene McAuliffe, whose testimony is quoted at pages 140-142 of the Commission's brief, was one of the witnesses who testified that it was a shortage of facilities other than cars that rendered a railroad company incapable of meeting transportation demands. It was also he who, having a mine on the Louisville & Nashville, testified that he had "stood at that mine for days and watched the locomotives and train crews of the Louisville & Nashville R. R. hauling empty and loaded cars past our premises and the premises of our neighbors to the mines of the United States Steel Company, to the absolute exclusion of general commercial traffic."

Mr. McAuliffe is also interested in mines on the Illinois Central, a coal originating road of equal importance with the Louisville & Nashville, and testified concerning Illinois Central conditions as follows:

> " * * * I am not reflecting on the service rendered by the Illinois Central Railroad, but in the opera-

tion of our mine there, the entire output going to two public utilities, we lost during March, 1920, 63 per cent of running time because of the inability of the Illinois Central R. R. to furnish us cars. *The compelling facts in the case were that the Illinois Central R. R. had plenty of cars but they were on the rails of connecting carriers that would not return them*—one of those carriers, if my memory serves me right, having 184 per cent of its ownership on its rails, and these cars idle by the hundreds or the thousands, possibly. * * *

* * * * * * * *

*" * * * I did not say that the Illinois Steel Company uses an undue proportion of the facilities of the Illinois Central with its cars. I said the Louisville and Nashville * * * "* (R. 704-5).

As is indicated in Mr. McAuliffe's testimony, the United States Steel Corporation obtains a part of its coal from Illinois Central mines in Illinois as well as from Louisville & Nashville mines in Kentucky. Mr. McAuliffe represented a coal company operating in the Illinois field, the Milwaukee Electric Railway & Light Company, the Wisconsin Gas Company at Racine, and the Detroit Edison Company of Detroit, owning a mine in Harlan County, Kentucky, being the Harlan District on the Louisville & Nashville, (R.) referred to in the foregoing quotation from the Commission. A large part of the coal from the Illinois and Kentucky mines in whose movement Mr. McAuliffe was interested was therefore destined to Milwaukee, Racine and Detroit, involving the use of connecting lines, whether coming from the Louisville & Nashville or the Illinois Central. Assuming, but not admitting that the Louisville & Nashville extended to the Steel Corporation an unfair and undue use of facilities other than cars, of which there was also a shortage, Mr. McAuliffe admits that the Illinois Central did not do so. It had plenty of everything but cars. Its difficulty was due to the failure of its connections

to return them promptly. Mr. McAuliffe's principals were located on such connections. Perhaps it may have been one of the connections required to reach these companies that is referred to by Mr. McAuliffe as having 184% of its car ownership on its rails "idle by hundreds, or thousands possibly,"—perhaps not. In any event, it is plain that Mr. McAuliffe's loss of 63% in running time at his Illinois Central mine, which in reality constitutes the sole complaint of himself and all other coal operators, was due not to the use of the private cars of the Steel Corporation or any other private car owner on the Illinois Central, but to the failure of connecting lines, including those serving Mr. McAuliffe's principals, to return the Illinois Central's system cars so as to maintain an adequate car supply to keep Mr. McAuliffe's mine working. The Steel Corporation's plant, to which the Illinois Central coal as well as the Louisville & Nashville coal was destined is on the other hand located in the Chicago district, and Chicago is the northern terminus of the Illinois Central. To reach Chicago, therefore, no connecting line service is required, while to reach the Steel Company's plant only a short haul over a connecting line is required, and this connecting line appears to have returned cars promptly.

Certainly the foregoing general observation in the Commission's report had no application to the Illinois Central situation. Neither did its reference to the movement of the Steel Company's coal by the Louisville & Nashville in the immediately preceding paragraph, said to be illustrative of the matter under discussion, apply to the Illinois Central's handling of the Steel Company's coal from its Illinois mines. Yet the order of the Commission runs against the Illinois Central as well as against the Louisville & Nashville.

This can be explained only upon the ground that in the opinion of the Commission it is an undue discrimination for a carrier to place and move a larger proportion of the

cars of a private car mine than of a system car mine when its tracks and those of its connections are open to destination, and there is ample motive power and other facilities to move both classes of cars to the full extent available, as well as when such disproportionate movement of private cars involves a preference in the use of other facilities.

(*f*) THE COMMISSION'S OWN SUMMATION OF THE EXTENT OF THE DISCRIMINATION FOUND SHOWS THAT ITS FINDINGS OF UNDUE PREFERENCE ARE BASED WHOLLY ON THE INCIDENTAL ADVANTAGES, GROWING OUT OF THE INEQUALITIES IN RUNNING TIME AND IN THE VOLUME OF COAL MOVED, BY REASON OF THE LARGER CAR SUPPLY AT PRIVATE CAR MINES DUE TO PRIVATE CAR OWNERSHIP AND ARE NOT BASED UPON ANY UNDUE PREFERENCE IN MOVEMENT OR IN THE USE OF OTHER FACILITIES.

Since the order is universal the extent of the discrimination shown must be equally broad. Otherwise the order is bad. After the Commission had thus twice considered and discussed the whole subject at length and made both the fragmentary specific finding and the general observations above noted, the Commission itself, and at the close of its second report, thus states its own final conclusion as to the extent of the discrimination shown:

> "*Extent of discrimination.**—We have already dealt generally with the discriminatory effect of the assigned-car rule as applied to both fuel cars and private cars. Opponents of this rule introduced evidence to show the adverse effect of the rule in respect to private cars, particularly on the Louisville & Nashville, the Chesapeake & Ohio, and the Pennsylvania. It was shown that during car-shortage periods private-car mines received practically a full car supply, while other mines on the same division of the same railroad received a comparatively small percentage of the cars ordered. Private-car owners

*Italics are those of the Commission, although not shown in the reprint of its report in the record.

themselves, in introducing evidence as to the necessity of the assigned-car privilege, showed in many instances the discriminatory effect of the rule. During car-shortage periods mines at which their cars were placed were able because of better car supply under the assigned-car rule to operate more regularly, at less expense, and with more efficient labor organization than such mines were able to operate with system cars only and than other mines similarly situated on the same railroads and depending entirely upon system cars were able to operate. As illustrative of this, the Fordson Coal Company, a subsidiary of the Ford Motor Company, had a car supply of approximately 22 per cent at its mine on the Louisville & Nashville for the six months' period prior to the first placement of its private cars at its mine in February, 1923, and was able to produce only about 34,000 tons of coal a month, while in March with practically a full supply of private cars it was able to produce about 72,000 tons, although the car shortage continued. The costs per ton were reduced from about $4 in November, 1922, and $3 in January, 1923, to $1.93 per ton in March, 1923, and labor at the mine was better satisfied. During the period when the Fordson Coal Company was dependent upon system cars other private-car owners in the same district received practically a full supply of private cars at their mines.

"Further evidence of the advantage which private-car owners received from the preferential placement of their cars under the assigned-car rule is to be found in the fact that they were willing to lose many hundred thousands of dollars in the operation of their cars in return for the advantage of such preferential placement during car-shortage periods. The railroads pay to private-car owners an allowance of 1.5 cents per mile for use of their cars. This, it was testified, was hardly sufficient to pay the cost of repairs alone. The Westmoreland Coal Company showed, for example, that for the two years and nine months ending September 30,

1923, the revenues received for the use of its 2,019 cars were $784,424, expenses for repairs amounted to $820,755, total expenses including interest and depreciation amounted to $1,329,488, and the net loss to the company was $545,064, or a loss per ton of coal handled in private cars of 18 cents in 1921, 13 cents in 1922, and 8 cents in the first nine months of 1923. Private-car owners, it is to be observed, use their cars throughout the year, both in periods of car shortage and in periods of full car supply.

"As to the contention that the use of private cars during car-shortage periods releases railroad cars for commercial mines, which otherwise would have to be placed at private-car mines, 'this overlooks the fact,' as we pointed out in our original report, 'that particularly in time of shortage the mine operator is entitled to an equitable rationing of the transportation facilities which are at hand, and that equality is vastly more important to him than a slight addition to his allotment effectuated by giving his neighbor and competitor a better car supply.' Furthermore, if private cars should be withdrawn from carrier service and the remaining supply of cars should be inadequate, we have power under the act, as we also pointed out in our report, to require the carriers to furnish an adequate supply." (R. pp. 114-116)

In its final summarization, therefore, the report sets forth both the Commission's conception of what constitutes undue discrimination and the extent to which it has been found. Its character and extent as thus stated by the Commission may be summarized as follows:

(1) The adverse effect of the existing rule on car supply, particularly on three railroads. (The same three to which the preceding specific finding had related.)

(2) Inequalities in running time, etc., due to inequalities in car supply. (These are the purely

commercial advantages and disadvantages, to which we have hitherto referred.)

(3) Private cars must be advantageous because operated at a loss to their owners.

(4) Although the use of private cars during car shortage periods releases system cars for commercial mines, which would otherwise have to be placed at private car mines, equality of cars is more important to the commercial mine owner than additional cars, and if relatively more cars are moved from the private car mine there has been an inequitable "rationing of transportation facilities." (That is to say, any disproportionate movement results in a disproportionate use, and hence, on that account alone in an inequitable "rationing" of other facilities, quite irrespective of shortage of other facilities or of any undue preference in movement or of the carrier's ability to move all cars available.)

It is thus plain from the Commission's own statement, both of the kind and extent of the preference and advantage shown, as well as from the foregoing review of its report, that this universal order is not based on the Commission's fragmentary findings of undue preference in movement; but is based solely upon the ground that an undue preference and advantage to the private car owner, working an undue prejudice and disadvantage to other coal operators, arises if the railroad transports relatively more coal for the former than the latter by using all of the former's cars which may be available under the circumstances, without giving them any undue preference in movement, and without using for their movement any more than an equitable proportion of other transportation facilities, of which there may be a concurrent shortage. Furthermore that the sole consideration that induced the Commission to the adoption

of this view is the inequality in mine conditions resulting from such greater movement. We repeat that the private car owners do not contend that, when there is a shortage of other facilities, the movement of their cars shall be given undue preference, or that they are entitled, in such circumstances to anything other than an equitable rationing of such other facilities. Their contention is that when other available facilities on the line on which the car shortage exists are sufficient to move all available cars, both system and private, they are entitled to have the full available supply of their cars moved if the Railroad Company is willing to handle them, and that so to do results in no undue discrimination under the standards established by Section 3. It is this which it is the intended purpose and effect of the order to prohibit. It is this of which the appellees complain.

It is said in the Commission's brief that the stress placed upon this effect of the order by the respondents and the Court below results from too narrow a view of the situation. The trouble is not with the narrowness of the appellees' view and of that of the Court below but with the breadth of the Commission's order.

It is plain that, as applied to this situation, to which the order concededly applies, it may be sustained only upon one of the three following hypotheses:

(*a*) That an undue preference within the meaning of Section 3 arises by reason of the incidental advantages in mine production, labor conditions, costs, etc., resulting from the use of private cars; or

(*b*) That the inequality in transportation service performed constitutes an undue discrimination irrespective of any preference actually accorded to the movement of such cars in the use of the other facilities available; or

(*c*) Because undue discrimination *may* result or is likely to result from the use of private cars in excess of the

pro rata distribution of system cars, such use may be prohibited altogether.

That (*a*) does not constitute undue discrimination under the standards of Section 3 has already been established.

(*g*) MERE INEQUALITY IN THE VOLUME OF TRAFFIC MOVED DOES NOT CONSTITUE UNDUE PREFERENCE OR GIVE RISE TO UNDUE PREJUDICE.

As stated, Section 3 does not prohibit all preferences and advantages and their corresponding prejudices and disadvantages, but only those that are undue. A mere inequality in amount of traffic moved and hence in the amount of service rendered for one shipper, as compared with another, does not give the former an undue advantage. Whether the advantage thus derived is undue or not depends upon the circumstances.

It is urged that in time of car shortage the use of private cars in excess of the general distributive share of cars necessarily gives the private car mine a greater movement of coal and therefore more service and that to give the private car mine more service is to give it a preference which is undue and in violation of Section 3. This argument is unsound. A man who owns a private elevator may be able to unload and load cars at a time when the public elevators are congested so that shippers cannot unload or load thereat. A man who owns a private stock pen may be able to ship or receive cattle at a time when the carrier stock pen is congested, so that the shipper who uses the same is kept from shipping or receiving his cattle. A shipper who owns a private refrigerator car may be able to ship his output when another shipper dependent upon the carrier's refrigerator cars may be unable on account of shortage to get a car at the same time. In all of these cases it happens that the owner of the private facility

gets a service when the owner depending exclusively upon the carrier facility may be unable to get an equal service. But it has always been recognized that the ownership of these private facilities is not unlawful. The advantage that flows from them is an advantage due to the enterprise or fortune of the owner and it has never been treated as an undue preference under the Act. In the same way the greater movement of coal which a private car mine may get if private cars are available in excess of the distributive share of cars is not an undue preference. In the *Diffenbaugh* case, *supra*, the shipper owning the private elevator also had an important advantage incident to that ownership and this court held that such advantage was not unlawful, inasmuch as it was a mere incident to the lawful ownership of a private elevator and inasmuch as it was not the purpose of the Act to equalize fortunes, opportunities and abilities.

The Commission in dealing with its present theory of "equality" has departed entirely from the standard of illegal inequality which is the basis of Section 3. The Commission now adopts the view that there must be "absolute" equality in commercial opportunity between all coal operators in the matter of all cars; that any excess of cars handled for the private car owner, although such cars belong to him and can be handled without unduly preferential absorption of other facilities is a violation of this standard of "absolute" equality. This view of the Commission involves a basic misconception of the scope and purpose of the Act. The preference under Section 3 of the Act must be an *unreasonable* preference. The Act does not attempt to equalize "fortune, opportunities or abilities," *I. C. C.* v. *Diffenbaugh*, *supra*.

Therefore the present theory of the Commission that any inequality in service, in the sense of volume of movement, between one who owns cars and one who does not is a violation of Section 3, regardless of the difference in

condition and regardless of there being no unduly prejudicial absorption of other facilities by the owner of the private cars, is a basic misconception, fundamentally unsound and at variance with the language and purpose of the Act, and seeks to give the Act an effect which is utterly unreasonable and impractical. On the broad proposition that such a basic misconception invalidates the Commission's order, see *S. P. R. R. Co.* v. *I. C. C.* (*Willamette Valley* case) 219 U. S. 433, (referred to more fully below). Likewise see in this general connection the *New England Divisions* case, 261 U. S. 184, wherein it is declared that the Commission cannot accomplish a purpose not authorized by the Act and indicates that an order designed to accomplish any such purpose would be invalid.

Some reference is made in both reports to the fact that private cars customarily move in shuttle service in large blocks between mine and plant and hence may receive quicker service in both directions. No claim is made, either in the brief of the Commission or of the United States that any undue preference results. That it does not is plain. While private cars are used to carry coal in large quantities regularly between a single mine and a single consignee and destination, system cars scatter singly or in small blocks to many consignees and many points. Such blocks of private cars are necessarily kept intact in the interest of economical and efficient operation. To split them up and give them piecemeal handling would result in waste and congestion. There is neither a finding nor basis for finding that the same character of movement is not given to a block of cars coming from a system car mine and moving to a single destination. The only difference is that, since the system car mine has no right to the continued and exclusive use upon their return of the cars which may be loaded today, these cars upon their return may be distributed to others, and, if the supply of system cars is short, must be pro rated among all system car mines

according to their relative demands, while the private cars continue to be used for carrying their owner's coal in service between the same points and over the same route. This does not involve preferential movement, but is merely the incidental advantage growing out of the lawful right to the ownership and exclusive use of private cars. That such incidental advantages do not constitute discrimination under the standards of Section 3 has already been demonstrated.

(*h*) THE ORDER CANNOT BE SUSTAINED MERELY BECAUSE AN UNDUE PREFERENCE EITHER MAY OR IS LIKELY TO ARISE.

If it should be said that the Commission became convinced that violation of Section 3 through an undue absorption of other facilities might result from the continued use of private cars under the present rule or was even likely to be quite general, and that therefore the best thing to do was to wipe out the beneficial features of private car ownership, the first answer would be that neither the Commission's findings as hitherto reviewed nor the evidence relied on by the Commission to be hereafter reviewed go to this extent. An additional answer would be that such a procedure is not warranted under the act. If the Commission finds that the Act has been violated or is likely to be violated, it must deal with the violation. It cannot strike down as a whole practices which are not as a whole unlawful. An interesting illustration is afforded by the *Tap Line cases*, 234 U. S. 1. In that case the Commission found that a practice whereby the trunk lines gave divisions to short lumber railroads, known as "tap lines", owned by the companies manufacturing lumber operated to cause undue prejudice to other lumber manufacturers who did not own such tap lines. The Commission therefore thought the simple thing to do was to wipe out the divisions instead of policing the divi-

sions to see that they were not of such a character as to be unduly prejudicial. The Supreme Court held that the order should be set aside. The court admittted that the report and supplemental report showed that abuses existed resulting in unfair advantages to some, and said the Commission "has the authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantages to particular shippers or carriers", and declared that it was within the province of the Commission to reduce the amount of a division to a tap line so that it should receive only just compensation (pp. 28, 29). It should be mentioned, that the Commission's investigation in the *Tap Line case* was much more searching and specific than in the present proceeding. In the *Tap Line* case the Commission had conducted a special investigation as to several individual tap lines and had reached the conclusion as to each of them that any divisions out of the through rate would result in undue and unreasonable preferences. The Commission's investigation and finding in the present case are far more fragmentary and inconclusive. They cannot serve as a broad enough basis for this order. They were not intended so to serve. The order was based upon the broader misconceptions above dealt with.

The Commission's two reports in this case fail to show that the majority of the Commission gave any consideration whatever to any plan to correct any illegalities which might actually arise under Section 3 through the undue absorption of locomotives and other facilities by private car owners to the prejudice of other operators who were thereby prevented from having system cars moved for them which were available for movement. Yet dissenting Commissioners Hall, Daniels and Potter indicated that such steps to correct the illegalities themselves were feasible under the law. (*First Report*, R. 61, 65; *Second Report*, R. 121.) In the *Ruttle* case, 13 I. C. C. 179, the Commis-

sion itself had pointed out that if under a given state of circumstances the use of private cars would result in an unlawful advantage, there would be "the basis of such relief as the facts in any particular case may justify". (13 I. C. C. 179, 185.)

The failure of the Commission to make any attempt to correct such instances of unjust prejudice as might arise through undue absorption of locomotives and other facilities by private car owners again proves that the Commission was not basing its order upon such instances as might exist of undue prejudice of this character, but was merely mentioning these matters by way of supplement to the considerations which fundamentally determined its attitude.

If there were stricken from the Reports everything that was said about "inequality" in general, differences in working time and resulting effect upon mine labor, and desirability of cars and coal purchases being distributed more uniformly, and nothing was left in the Reports except the few pages dealing in fragmentary and unconvincing fashion with the question of undue absorption of other facilities, it is clear that such a universal order would be regarded as void on its face and on the face of the Reports.

(*f*) THE CASES PARTICULARLY RELIED UPON BY THE COMMISSION IN ITS REPORTS AS SPECIFICALLY INDICATING THAT ITS ORDER IS WITHIN THE SCOPE OF THE ACT DO NOT SUSTAIN THE ORDER UNDER SECTION 3.

So far as the Commission relies upon cases to the general effect that its orders will not be set aside if constitutional and if in form, substance, and spirit within the scope of the Act, the cases have no bearing whatever, because our contention here is that the order is wholly beyond the scope of the Act, being based upon standards

which are not legitimate tests under the Act, upon a fundamental misconception on the Commission's part as to the scope of the Act, and amounting, furthermore, to a remarkably arbitrary overturning of a long-established practice which has been systematically recognized not only by the Commission but by Congress and the courts.

The Commission, however, in its Reports, seems to particularly rely upon two cases, claiming that they indicate that this particular order is within the scope of the Act.

The first of these cases is the *New River* case, 265 U. S. 533. In that case a joint mine (*i.e.*, situated on two railroads), was getting a greater proportion of system coal cars than was a local mine (*i.e.*, situated on only one of the railroads). The Commission held in effect that this constituted an unjust discrimination and that the mere fact that the one mine was located on two railroads gave it no right to any greater proportion of railroad system cars of the carriers than if it were located on only one railroad. It did not deal with the distribution of private cars. The Commission prohibited the practice of giving the joint mine this undue advantage. This Court upheld the order, and pointed out that the Commission had jurisdiction over car distribution. But it will be observed that the Commission was exercising that jurisdiction to prevent *undue preference and unjust prejudice* in the distribution of system cars contrary to the Act. Of course the Court did not mean to say that the Commission could do anything it pleased with respect to cars because it had jurisdiction over car distribution. It was necessarily implied in the court's observations, and was clearly exemplified in the particular situation, that the Commission was exercising its power *to prevent a violation of the Act* in a respect as broad as the Commission's order. Our claim here is that there is neither substantial proof nor a finding by the Commission of any *violation of the Act* sufficiently broad to support this universal order.

The other case relied upon by the Commission is the *Illinois Central* case, 215 U. S. 452. This case has been fully discussed under Point I, 3 (*c*) of this argument. The subject matter was an order of the Commission designed to correct what was obviously an undue preference in the distribution of system cars in violation of the Act. The means employed were clearly appropriate and not beyond the Commission's discretion. The Commission had made no attempt to prevent the full number of (railroad fuel cars or) private cars from being delivered to the mine to which they had been assigned. The fundamental differentiating condition between this *Illinois Central* case and the present case is that in the *Illinois Central* case there was an undue preference in the distribution of system cars to be corrected under a correct construction of the law, and hence the Commission had the power to make an order appropriate to that end, (the order being no broader than the undue preference), but in the present case there is no undue preference to be corrected, and no other violation of the Act to be corrected upon any correct construction of the law by any order of universal application, and hence the Commission has no power to make the order.

2. The evidence relied on by the Commission to sustain the order likewise shows that the order was based on a fundamental misconception of the standards governing action under Section 3 and is wholly insufficient to sustain the universal order made.

While the record in this case is voluminous, little of the evidence relates to transportation conditions. As previously stated, ninety per cent. of it is devoted to conditions in the coal industry, and the effect of the assigned car upon mine production, labor costs, labor turn-over, contented help, etc. It is not too much to say that the objections to the Assigned Car Rule of practically every

complaining witness was based upon these considerations and not upon an assumed general or a sporadic actual preference in the movement of private cars. Even if the Commission had made a definite finding that all car shortages grow out of a shortage of other facilities, and are accompanied by their preferential use for the benefit of car owners, such a finding could not have been sustained by the evidence. The evidence relied on by the Commission is reviewed in its brief (pp. 136 to 150). Preliminary to this review, the brief says (p. 137):

> "* * * The Commission's findings show that it carefully considered the causes of car shortages and the effects; that the natural consequences of applying the assigned car rule will be to give assigned car mines an unjust and unreasonable share of railroad services and facilities other than cars and to deprive unassigned-car mines of such services and facilities; and that the only reasonable and practicable rule which will reach and eliminate such unjust and preferential practices is the *pro rata* rule which it has prescribed."

Immediately following such review the brief says (p. 150):

> "Private car owners in the lower court laid stress upon the admittedly overdeveloped coal mining industry and pointed to the fact that at times because of this overdevelopment carriers are called upon to furnish more cars than they would be required to equip themselves with under the law, and that the very purpose of the private assigned car is as a protection against such times. However, when such increased demands for cars arise from mines which have operated regularly and from mines which have sprung into operation, the insufficiency is felt not only in the number of cars, but in employees, locomotives, tracks, terminals, and other equipment of the carriers, and the assigned car rule operates to give private car mines an unfair and preferential use of railroad services

> and facilities other than cars. A mine, for example, which receives 100 per cent supply in private cars receives more service and more of the use of such facilities than a mine of the same rating receiving only a 50 per cent supply. The same unfair and preferential use results when there is a breakdown of the transportation machine because of strikes, weather conditions, or other causes."

Note particularly the last two sentences, from which it is apparent that it is upon the greater degree of use alone rather than upon the circumstances surrounding such use that the Commission's contention that discriminations in the use of other facilities are "the natural consequences" of the Assigned Car Rule, rests. If more is claimed and if it is contended that all car shortages are accompanied by shortage of other facilities and their preferential use in the movement of private cars, the evidence referred to in the Commission's brief in support of its position is totally insufficient to sustain it.

After referring to the general observations in the Commission's reports, already analyzed, and after quoting from the report of the American Railway Association Committee, set forth above, the brief quotes at some length from the testimony of nine witnesses. In view of the importance thus attached to the testimony of these particular witnesses, it may be assumed that in the opinion of the Commission its order either finds its chief support on this aspect of the case in their testimony, or that their testimony is at least typical of that upon which the Commission relies.

The first witness quoted from is Mr. McAuliffe, to whose testimony we have already referred. His testimony may be dismissed from consideration with the statement that while he assumed to ascribe car shortages generally to shortage of other facilities, and charged that the Louisville & Nashville had given private cars undue preference in movement, he admitted that the concurrent shortage on

the Illinois Central was due entirely to the failure of connecting lines to return cars, and that that carrier gave no preference to the movement of private cars. Manifestly, no universal order can be supported on his testimony or on any amount of testimony like it.

On pages 143 and 144 an extract from the testimony of Mr. Huber, an operator on the Pennsylvania Railroad, is set out. In this extract Mr. Huber says:

> "In 1920 a situation developed that I had never seen anywhere"

and again says:

> "The same condition obtained in 1922."

Mr. Huber's testimony is therefore based entirely upon the abnormal conditions of those two periods of transportation crises created by the post-war adjustment and the shopmen's strike, respectively. Experience during these periods is manifestly of little probative value as applying to recurrent car shortages which take place periodically, when other conditions are normal. Scattered throughout the extract reproduced in the Commission's brief are asterisks indicating the elimination of intervening matter. The most significant thing about Mr. Huber's testimony between the pages covered by the reproduced extract is not in the part reproduced but in the part eliminated and represented by asterisks, where Mr. Huber said:

> " * * * I have the figures between the 8th and 14th, inclusive, and they show (1572) approximately 536 system cars loaded with railroad fuel on those six working days out of a total of 763 system cars placed on the division. For the same six days 541 Berwind cars passed through South Fork. I have no exact information as to when they were placed at the mine. I and my associates up our way had inspectors out making a survey of the

> situation. We had men constantly at South Fork to get the information. *I have no report on misapplication of motive power of the railroad as between assigned and unassigned cars.* * * *" (R. p. 936.)

Thus, although Mr. Huber had inspectors surveying the situation during the period of which he complains, he received no reports of any undue preference accorded to the movement of private cars.

On page 144 of this brief Mr. Poston is reported as having said:

> "If the coal was put down just as soon as there was a car surplus we never would have occasion for an assigned car because we have no coal-car shortage. (2347) The trouble is that when these high prices prevail it dilutes (2347) every kind of transportation facility. It subdivides the effort of transportation and it subdivides the locomotives and the cars." (R. 1022.)

Of course, the movement of traffic for a number of different people with or without a car shortage subdivides the use of locomotives and cars, but this is no proof of undue preference in use, whether there be a car shortage or not.

Quotations from the testimony of Messrs. O'Neill and Boyd on pages 144 and 145 contain no statement either that car shortages are invariably accompanied by shortage of other facilities, or that within their knowledge any undue preference had been accorded to the movement of private cars at a time when other facilities were short.

Mr. Bower of the New York Central Lines is quoted on page 145 as testifying:

> "Car shortages are due to congestion." (R. 1126).

Mr. Bower is the Railroad's Purchasing Agent, not an operating officer. His testimony related to the manner

in which the New York Central bought its coal and to the necessity for the use of assigned cars in obtaining it. He did not attempt to qualify as a transportation expert. It may be true, as suggested by Mr. Bower, that car shortages are due to congestion, but this is no proof that they are due to congestion or shortage of facilities *on the line whose cars are short.* The congestion causing the shortage may very well and, we believe, usually is to be found on connecting lines, preventing them from returning cars promptly, as in the case of the Illinois Central situation described by Mr. McAuliffe. Mr. Bower's testimony, of course, lends no support whatever to the contention that private cars are given undue preference in movement during car shortages.

The testimony of President Pearson of the New York, New Haven & Hartford quoted on page 145 amounts to no more than a statement that in order that a railroad may function properly, all of its parts, terminals, locomotives, shops and cars must be developed together. It contains no support for the proposition that car shortages are always accompanied by shortage of other facilities on the line on which the car shortage exists, or that private cars have been given undue preference in movement.

President Campbell of the Youngstown Sheet and Tube Company, whose testimony is quoted on page 146, said in the extract quoted that sometimes a shortage of power accompanied a shortage of cars, and sometimes not, and is thus directly contrary to any assertion that a car shortage is always accompanied by a power shortage. Mr. Campbell did not testify as to any undue preference in the movement of private cars, either when other facilities were short or not. On the contrary, as a private car owner, he distinctly disclaimed any demand that such preference should be given and limited his assertion of right to the use of the full supply of available private

cars at those times when there was no shortage of power, or other facilities, and such cars could be moved without their preferential use, which is the thing which the order of the Commission forbids and of which the respondents complain.

On pages 146 and 147 Mr. Davin of the C. & O. is quoted as follows:

> "Q. (By Mr. Bronson.) * * * There has been an apparent car shortage on the C. & O. since about July 10th (1922) of this year, as I recall it. Is that an actual car shortage?
>
> A. It is not what I would call a car shortage as much as it is a motive-power shortage, due to the shopmen's strike. The car shortage first appeared on July 10; that is, we were short of cars, although we had sufficient cars on the line but not sufficient power to move the cars. * * *
>
> A. At the present time it (the car shortage) is due more or less to the failure of the connections to take our loads promptly, and the situation has turned from a car shortage and a power shortage to the inability of the connections to take currently.
>
> Q. And that might again turn?
>
> A. It might turn any day." (R. 789).

All that can be gotten out of this is that the C. & O. had one car shortage to which motive power contributed, and another which was due to the inability of connecting lines to return its cars.

This concludes a review of all the testimony extracted in the Commission's brief in support of the order, insofar as it rests upon an asserted undue absorption of other facilities. It is typical of the testimony of other witnesses referred to, but not quoted, on page 149 of the brief. Except for the situation on the Louisville & Nashville, the evidence relied on contains no proof of undue preference in movement whatever. As to the relation between car shortages and a general shortage of facilities is concerned,

it simply demonstrates that there is no such thing as a typical situation but a diversity of conditions, as might be anticipated because it is self-evident.

Indeed, as we have already pointed out, the Commission itself made no finding of undue preference in the movement of private cars at a time when there was a shortage of other facilities, except as to three railroads, the Louisville & Nashville, the Pennsylvania, and the C. & O., and limited that finding to certain times and certain places on such roads during the abnormal conditions of 1920-1923. It did not contend that such undue preference was typical even of the operations of those roads. That their situation is not typical either of general conditions, or of their own operations, and that even the limited findings of the Commission are unsupported by the evidence, will appear from the following review of the testimony referred to in the Commission's brief as descriptive of conditions on these three lines.

The finding in respect of the Louisville & Nashville was limited to a single district on that railroad, the Harlan District in Kentucky, and on its face is not put forth as typical of the operations of that company. The situation on that district was a confused and complicated one into which it is unnecessary for the Court to go. According to the testimony of the operators' spokesman, the first and primary cause of the difficulty was that "the development of the coal mines in the Harlan field has been greatly in excess of the ability or capacity of the Louisville & Nashville to handle the output of the mine." (Boyd, R. 1501.) Whether the situation was further aggravated by some undue preference in the movement of private cars is not altogether clear. Perhaps such preferences were given. There is no doubt but that the operators thought they were. In view of the practical difficulties created by the situation described, it may well be that in endeavoring to take care of the movement as well as possible, what

looked to the operators like a discrimination in the movement of private cars, detrimental to the system car operators' supply, may not have involved any undue preference in the movement of private cars whatsoever. But whether there was such preference or not is of no consequence. The situation as described above by the coal operators' spokesman was clearly a local one, in no way typical of general conditions.

The testimony relied on in the Commission's brief as descriptive of the situation on the Pennsylvania Railroad is that of Messrs. Jones, Watkins, O'Neill and Huber. We have already pointed out that, although Mr. Huber had inspectors watching the situation they made no reports of undue preference in the movement of private cars. Neither did Messrs. Jones, Watkins or O'Neill, unless their complaint, made in common with all coal operators, that the effect of the Assigned Car Rule had been to give the private car mine a larger supply than theirs, coupled with the statistical data offered in its support, is deemed evidence of such preference. Of course it is not. As we have hitherto pointed out, the necessary effect of the over-development of the coal industry is in itself to create an excessive demand for cars, resulting in a car shortage for system car mines, irrespective of any other circumstance, and to guard against which private cars have been acquired by their owners. Since, under such conditions, the system mine cannot expect anything like a full car supply, while the private car owner, whose cars are confined to his service alone, may, it is clear that the private car owner will have a larger supply than the system car miner irrespective of any preference in movement. In respect of the relation between a car shortage and a general shortage of other facilities, it does appear that at certain periods during the abnormal conditions of 1920 and 1922 there was a power shortage on certain parts of the Pennsylvania. An illuminating

and highly significant explanation of this situation, however, is to be found in the testimony of Mr. O'Neill, Secretary of the Central Pennsylvania Coal Producers Association, and one of the chief witnesses who dealt with the situation on the Pennsylvania Railroad, and who testified as follows:

> " * * * the shopmen's strike commenced on July 1, with the result that in several weeks many of the other roads were severely affected by the shopmen's strike. The 40 per cent motive power which the Pennsylvania Railroad had idle up until that period was immediately put into service to take care of the traffic that was offered to the Pennsylvania Railroad *which could not be handled by other roads during that shopmen's strike,* with the result that when the coal miners' strike ended in September the motive power (1871) on the Pennsylvania Railroad was in bad shape, their shops having been affected east and west of Altoona very seriously, their Altoona shop being the only one that had stood up real well." (R. 1493.)

It thus appears that the power shortage on the Pennsylvania, upon which the Commission's finding is predicated, was due to the fact that the Pennsylvania was required to handle traffic which would normally move over other lines which were unable to move it because of the effect of the shopmen's strike upon their power.

While witness Jones, Statistician of the Central Pennsylvania Coal Producers Association, to whose evidence the Commission's brief refers, first testified that "some" of the 1920 car shortage on the Pennsylvania was due to insufficient locomotive power (R. 923), it subsequently appeared that this was largely an assumption on his part (R. 925, 931) supported by no tangible proof. He also admitted that he knew of no specific instance where motive power was short, and assigned or private cars were moved in preference to unassigned cars (R. 933).

Witness Watkins, the remaining witness referred to in the Commission's brief, testified on neither of these phases of the situation.

The witnesses whose testimony is said in the Commission's brief to be descriptive of the situation on the C. & O. are Messrs. Higgins and Davin. Mr. Higgins also conceded that it was entirely possible to have a shortage of coal cars without any shortage of motive power or other facilities (R. 943). His position was that the use of private cars was unobjectionable if they are not given preferential movement (R. 943). He admitted with respect to those days on which he said there had been a preferential movement of these cars that there were not in fact any system cars left which had not been moved (R. 944).

We have already reproduced the extract from the testimony of Mr. Davin in the Commission's brief, showing that one of the car shortages on the C. & O. was accompanied by a power shortage and the other was due to the inability of the connecting lines to return cars. Mr. Davin, who is in charge of coal car distribution for the C. & O., also testified as follows:

> "Those cars [private cars] shuttle from and to the industry (p. 867). I would hardly call that special transportation service. They take the same movement as the rest of the coal on our line. While that is intact, we handle it with a great deal less work, and we do not give it a special movement. As to requiring private cars to be placed in blocks, that is the empties returning, not the loads going to the consumer. We do that to enable us to give better transportation service to our system cars to prevent unnecessary switching. It uses no more motive power than the system car; not as much." (p. 790.)
>
> "Our power situation recently necessitated discontinuing even the practice of assigning private cars, and the motive-power situation did not sufficiently improve to enable us to handle foreign rail-

way-fuel cars in accordance with the Hocking-Valley Traer rule until November 10th." (p. 784.)

The first shows a complete lack of preference in the movement of private cars, even on a road which had a power shortage; and the second, a decided discrimination against them. This testimony of Mr. Davin is uncontradicted and is a part of the testimony referred to in the Commission's brief as descriptive of the situation on the C. & O.

It thus appears that even the limited and qualified findings of the Commission concerning these three railroads are unsupported in so far as they relate to preferential car movement, with the possible exception of a highly localized situation on the Louisville & Nashville.

Reference has already been made to the testimony of Mr. McAuliffe, one of the chief opponents of the assigned car rule, that the Illinois Central's car shortage was due to the failure of foreign lines to return its cars and was unaccompanied by any preference in the movement of private cars which were available in larger numbers when system cars were short.

Vice President Galloway of the Baltimore & Ohio testified that the car shortage on his line was due to lack of cars, except that there had been periods on the St. Louis Division when there was lack of motive power (R. 757, 758).

There is no contention on the part of anybody that the Baltimore & Ohio gave any preference to private car movement.

It is said in the Commission's brief (p. 147) that, "The Commission in making its findings had before it evidence both comprehensive and typical in character." That the evidence is not sufficiently comprehensive to support a universal order is plain. It is confined to the

situation on five or six railroads, while the order runs against every railroad in the United States. On certain parts of three of these railroads, at certain times, the car shortage was accompanied by power shortage, due, however, primarily to the abnormal conditions growing out of the two most extraordinary crises in transportation that have ever existed. On two, even in these times, if there was any shortage of power it was negligible and highly localized. On one, the Louisville & Nashville, it may be conceded for the sake of argument that private cars were given preference in movement, although under the special conditions obtaining it is fairly debatable whether such preference was undue. On two the opponents of the assigned car rule did not even claim the existence of preferential movement. On two others the claim was made but, as indicated by the foregoing review, not supported. Assume, however, that it was. Such evidence is clearly insufficient to form the basis of any finding that the use of private cars in times of car shortage has been generally accompanied by such preferential movement or that such preference in movement is the natural consequence of the use of private cars.

In so far as the evidence being typical is concerned, it is typical only in the sense that it shows that variation in conditions, which is to be anticipated. It is in no respect typical in the sense that the situation on one railroad may be regarded as typical of all, for just the contrary appears. Fragmentary evidence of isolated and differing situations, of the character relied on in the Commission's brief cannot be made the substitute for the typical evidence necessary to support a general order. *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 291. The record thus shows not a conflict of testimony but a diversity of conditions. It is thus plain from the evidence relied upon by the Commission, as well as upon the face of the report, that when the Commission talks about un-

due absorption of other facilities, inequalities in transportation service, etc., it means the inequality that arises solely from the fact that if more coal is moved from a private car mine than from a system car mine of the same capacity, the owner of the former has received more transportation service than has the owner of the latter. On the other hand, preference in movement is shown by the evidence upon which the Commission relies, to have been neither the customary accompaniment nor the natural consequence of private car use and ownership. Unless, therefore, under the standards of Section 3, mere inequality in transportation service, under any and all circumstances, growing out of the carriage of a larger proportion of one shipper's offerings than of those of another constitutes undue discrimination, the order cannot be sustained upon the ground of undue preference in the use of other facilities or undue absorption thereof.

POINT III.

THE ORDER CANNOT BE SUSTAINED UNDER SECTION 1 AS A REASONABLE RULE OF CAR DISTRIBUTION OR UPON THE GROUND THAT THE EXISTING RULE IS UNREASONABLE.

As we have seen, the order may not be sustained upon the theory that because private cars operate in common carrier service, the Commission may make any disposition of them which it could make of carrier equipment. Before their present use may be condemned by the Commission under Section 1, it must appear that it is unreasonable under the customary standards of Section 1, and its finding must be sustained by evidence.

While the Commission asserts that the Assigned Car Rule is unlawful because unreasonable under Section 1 and discriminatory under Section 3, the mere reading of its two reports will show that supposed discrimination is really the sole basis for its order. The reasons advanced for the finding of unreasonableness are the same as those advanced for the finding of discrimination. The Commission expressly abandoned any attempt to treat separately the question of reasonableness and the question of discrimination, saying:

> "These questions may be considered together." (R. 29.)

The "consideration" which follows this statement is confined entirely to the *relative* effect of the rule upon mines receiving assigned cars as compared with mines relying on system cars. These relative effects are taken by the Commission to constitute undue preference of the former and undue prejudice of the latter. The Commission thus reaches the conclusion that the Rule is unreasonable *and* discriminatory. This is to say that it is unreasonable *because* discriminatory; in violation of Section 1 *because* it

is alleged to produce violations of Section 3. The District Court, on this point, said (Akron R. 68):

> "The gist of the finding of the unreasonableness of the assigned-car rule is that it is unjustly preferential and unduly discriminatory."

The Commission thus made neither an independent investigation nor an independent finding as to the reasonableness of the existing practice.

That the court will not be misled by the claim that an order is made under Section 1, when in fact the order rests only upon some claim of inequality, and that in such case it will refer the order to the proper section of the Act dealing with inequality, is shown in *Interstate Commerce Commission* v. *L. & N. R. Co.*, 190 U. S. 273. The Commission made an order prescribing lower rates to La Grange, Ga., a local point. It indicated that the order was made under Sections 1 and 4, (the latter being the long and short haul section). The court, however, indicated that the report made it clear that the Commission was dealing only with the inequality supposed to arise under Section 4 and therefore the order must be tested by the standards applicable under Section 4.

Furthermore, a finding that it is unreasonable for a carrier under any and all circumstances to place private cars for loading at any mine in excess of the general pro rata of system cars and to move them when loaded, even though the carrier has ample motive power and other facilities to move all cars of both classes, is on its face arbitrary, and any order based thereon void. It is a prohibition, not a regulation of commerce. It is the carrier's duty as well as its business to move all traffic for which it has available facilities of movement. Under Section 3 the Commission may make any appropriate order warranted by the facts and by the standards of that section to prevent undue preference. Manifestly, no order requiring a carrier to retire useful property from service can be sustained as a reasonable order regulating service under Section 1.

POINT IV.

THERE WAS NO FINDING THAT THE ORDER, AS APPLIED TO PRIVATE CARS, WOULD INCREASE THE SUPPLY OF CARS AT SYSTEM CAR MINES NOR COULD THERE HAVE BEEN.

As already shown the Commission in making its order went outside of the scope of the Act and applied improper standards in making its findings of unreasonableness and undue prejudice. Its order being on this account wholly invalid the consideration of the alleged effect on system car supply is patently irrelevant. However as the Commission has given prominence to this alleged effect in its reports some mention of it here is deemed proper.

In its original report the Commission dealt first with the Assigned Car Rule in its relation to railway fuel cars, beginning at page 535 (R. 30). In this part of the report (pp. 542-546; R. 36, 37) the Commission found that the effect of the use of the assigned car for railway fuel upon car supply was to diminish the car supply at commercial mine to some extent. In a subsequent part of the report, beginning at page 554 (R. 46), the Commission takes up the Assigned Car Rule as applied to private cars and makes a general finding as follows:

> "Much of what has been said as to the practical effects of the practice of assigning railway fuel cars, system and foreign, is equally descriptive of the results of the assignment of private cars. * * " (80 I. C. C. 554.)

Neither here nor elsewhere in the first report does the Commission find that the effect of the Assigned Car Rule as applied to private cars is to diminish the system car supply at other mines.

In the two quotations from its second report contained on pages 25 to 28 of the Commission's brief (93 I. C. C.

718, 720) the Commission merely adhered to its former finding. It referred specifically to pages 542-546 of its original report dealing with the effect of the use of the assigned car for railway fuel above upon car supply at commercial mines. In the second quotation it merely stated generally that its former conclusion that the supply of cars at commercial mines would be increased by abolishing the Assigned Car Rule is fully warranted. Since the Assigned Car Rule covers both railway fuel cars and private cars, it is self-evident that its abolition as to the former alone would, everything else remaining the same, increase the supply of system cars available for commercial mines by adding those system cars now assigned for railway fuel to such supply. In neither report did the Commission find, nor could it have found that the abolition of the Assigned Car Rule in its application to private cars, to the use of which other mines have no right, would increase their supply. All that the Commission said concerning the effect of the assigned car rule on car supply is based upon statistical tables or computations showing the percentage distribution of each class of cars at certain times and places, and what it would have been, if all three classes of cars had been distributed pro rata. Commenting on these the Court below said:

> "The commission also finds that the supply of cars at commercial mines would be increased by abolishing the assigned car rule. That conclusion is based upon tables showing that, if all the cars on certain railroads at certain periods, assigned and unassigned, had been distributed pro rata among all the mines in certain districts, the percentage distributed to the commercial mines would have been increased. Necessarily that conclusion assumes the right of the railroads to distribute not only railroad fuel cars but private cars to other mines than those shipping coal to their owners." (Akron R. 64-65)

It is of course self-evident that car supply at system car mines will be increased by the abolition of the assigned car rule as applied to private cars, only if such cars are distributed to other mines, either by order of the Commission or through the voluntary act of their owner. The order does not require the former. On the contrary, the Commission expressly disclaims any power to require such distribution. The Commission being without power to require such distribution, any finding which the Commission might have made that the supply of system cars would be increased by the abolition of the Assigned Car Rule in its application to private cars, would have been patently erroneous. The Commission can find facts but it cannot make a speculative finding as to the future conduct or intentions of parties before it.

The Commission's brief (pp. 130-131), sets forth an example of the manner in which commercial mine supply would be increased by abolishing the practice of assigning cars for loading railway fuel, and then says:

> "The same thing would be true as to private car owners if with a view to continuing their cars in revenue service they distribute them to mines so that they will not exceed the pro rata shares of such mines. * * "

Clearly any contention that the abolition of the rule as to private cars would increase the supply for other mines is based upon the assumption that private car owners will forego their right to the exclusive use of their own cars and permit them to be distributed to others and involves the necessary concession that; if they do not, system car supply will be unaffected.

POINT V.

THE ORDER CAN NOT BE SUSTAINED UPON THE THEORY THAT PRIVATE CARS WILL BE RENDERED UNNECESSARY IN THE FUTURE THROUGH THE EXERCISE BY THE COMMISSION OF ITS POWER TO REQUIRE CARRIERS TO PROVIDE ADEQUATE EQUIPMENT OR OF ITS EMERGENCY POWERS UNDER PARAGRAPH (15) OF SECTION 1.

This is so plain, that discussion of this point might well be omitted, especially as the contrary contention is not made in the briefs of the other side. However, in both Reports (80 I. C. C. 562, 93 I. C. C. 736) the Commission appears to assume that the provision in the Transportation Act of 1920 giving the Commission power to require carriers to furnish a reasonable supply of equipment differentiates this case from all preceding cases, and that the Commission is now in position to make up for any withdrawal of private cars by ordering the carriers to provide in place thereof cars of their own.

As above pointed out, the carrier is under no duty to provide itself with equipment for peak demands, but only with that which is normally required (*Supra,* page 6). The Commission itself has indicated in *In re Rules Governing Ratings of Coal Mines,* 95 I. C. C. 309, that the standard to measure the legally requisite amount of equipment is that it "shall be in volume sufficient to meet the country's needs."

It is clear that the Commission would never be justified in requiring carriers to add to their coal car equipment to such an extent as to provide a hundred per cent. car supply at the mines at times of the peak demand for coal. The Commission, in *In re Rules Governing Ratings of Coal Mines, supra,* indicates (p. 325), that according to available reports representing 77% of the coal production of

the country, the ratings for the mines should be 59,131 cars per day. The corresponding figure for 100% of the country's coal production would be 76,800 cars daily. For a six-day week this would represent a capacity of 460,800 cars, or, counting 50 tons to the car, 23,040,000 tons of coal. Since the average consumption of the country is less than 11,000,000 tons per week, it is clear that if all the mines were to order to the limit of their ratings, and if the carriers furnished only a 50% car supply, they would nevertheless furnish cars more than sufficient to meet the country's coal requirements. Under such circumstances the Commission could not and would not hold that the carriers must provide enough equipment to give the operators cars up to the maximum requirements of their ratings in times of peak demand.

It must be remembered that car shortage is a brief term to indicate the extent to which the supply of cars falls below the demand for cars. Hence car shortage embraces two factors, (1) demand for cars and (2) supply of cars. The shortage may be due to an excessive demand for cars as well as to a small supply of cars. In times of peak demand, the mines are likely to receive such large orders for coal that they will demand cars up to their maximum mine rating. Whenever the demand for cars thus suddenly rises, the car shortage will automatically appear because the aggregate mine ratings are so far in excess of the country's needs. Nevertheless the carrier will have a legally adequate supply of cars, and a legal justification for not supplying additional cars.

Therefore it is inaccurate for the Commission to imply that it could make full recompense to the private car owners and the consuming public for destroying the utility of private cars if it exercised its power to require the carriers to provide an "adequate" supply of cars. With a legally adequate supply of coal cars, car shortages are bound to arise whenever the demand for cars suddenly expands, as it does in the peak seasons in the coal.

Pages 117 to 128 of the Commission's brief are devoted to a justification of a finding assumed to have been made that there was no necessity for the use either of assigned cars for railway fuel or private cars. So far as private cars are concerned, a short answer would be that whether such necessity exists or not, the Commission is without power to deprive owners of their use except in accordance with powers specifically delegated in the act. If, as we contend, their use is not unreasonable, and does not result in any undue preference, it makes no difference whether it is a necessary use or not. If private car owners believe that the use of such cars is essential or desirable in the conduct of their business, such use, sanctioned by law, cannot be prohibited because the Commission thinks or finds otherwise. But the Commission made no such finding, at least in respect of private cars.

This part of the Commission's brief refers, for the text of such assumed finding, to certain quotations in its preceding Statement of the case. Between pages 37 and 42 of the statement are certain quotations from the reports of the Commission dealing wih the necessity, or lack of necessity, for the assignment of cars for railway fuel, with which we are not concerned. The suggestion in the brief that the Commission "found" that there was no necessity for the use of private cars is based wholly upon certain statements in the reports of the Commission, notably in the quotation to be found on pages 42 to 44 of the Commission's brief where appellees, the Commission pointed out that certain critical industries, similar to those represented by the appellees, did not use private cars, and that certain appellees themselves did not use them for their entire car supply. This the Commission in its brief converts into a finding that there is no necessity for such use. That is to say, because it is not universal it is not necessary at all. In further support of the contention now made, the Commission's brief on page 126 says:

> "The Commission pointed out in its report that many of the private car owners did not obtain their cars 'until the abnormal period following the termination of Federal control of railroads' on March 1, 1920. (93 I. C. C. 734.)"

In view of the fact that all of the Commission's observations in both reports in respect of the relation between car shortages and a shortage of other facilities, and likewise in respect of some undue preference in the use of other facilities on certain parts of certain lines of railroad, refer to the abnormal conditions of 1920 and the equally abnormal condition resulting from the shopmen's strike in 1922 and that all the evidence concerning these matters related to these two abnormal periods, the foregoing statement in the brief, with its accompanying quotation from the report, is both significant and to some degree amusing. That is to say, while the abnormality of these periods is put forth as a pretext for stating that there is no necessity for the use of private cars, the whole report of the Commission, insofar as it relates to transportation shortages and undue preference, is based upon the events of the same abnormal periods.

The Commission's own findings, in which the percentage of car supply at private car and system mines are contrasted, is in itself sufficient proof of the necessity for the use of private cars for those concerns to whom a daily dependable supply of coal of suitable quality is essential. Only by such ownership and use can appellees and others protect themselves against the results of recurring car shortages. That all have not done so, or that some have not surrounded themselves with complete protection in this regard is beside the point. That there is such an economic necessity, under the conditions now existing in the coal industry, is at least inferentially recognized by the Commission in the quotation from its report on page

45 of the Commission's brief, in which the Commission says:

> " * * * The evidence which has been presented as to the *economic necessity* of individual shippers or classes of shippers does not, we think, warrant us in concluding that this inequality of treatment is justified under the provisions of section 1 and 3 of the act. * * * " (p. 45.)

From practically the beginning of rail transportation until the present time protection against coal car shortages through the ownership of private cars has been regarded as legitimate and lawful. The present order seeks to destroy all the benefit which would result from such a practice. The question is as to the validity of the order. The consideration of the question may not be confused by any assumption that the Commission by the exercise of the power conferred upon it to require a carrier to provide a legally adequate car supply will be in a position to provide for the benefit of coal consumers any additional equipment to take the place of private car equipment, which promises to be driven out of the service if this order is made operative. The carrier's car supply is already legally adequate, as shown above.

Neither may the order be sustained upon the theory that the economic necessities of private car owners may be taken care of by emergency orders under paragraph 15 of Section 1. The Court below held that the control of private cars is not within the emergency powers conferred upon the Commission by paragraph 15 of Section 1, which the Court held were confined to the control of carrier equipment. In this the Commission says the Court erred. The language employed in the statute seemingly supports the Court's construction. Whether the Court was right or wrong is of no consequence. The exercise of these emergency powers is wholly within the discretion of the

Commission. It cannot be forced to exercise them in anybody's behalf. It may actually discriminate in their exercise, and there is no remedy. Whatever benefits are received by anyone under these powers come as a matter of grace, not of right. If private car owners have the lawful right to use their cars in the manner in which they are now being used, they cannot be deprived of that right upon the ground that the Commission *may* permit such use in the future as a matter of grace. Furthermore, it is a somewhat remarkable suggestion that a practice which the Commission condemns as a general practice because of its consequences on mine production, etc., may be authorized in special cases with the same resulting consequences. If it is right for A to have the use of his private cars when they may be used without being given undue preference in movement, it is right for B to have the same use, and the Commission may not deprive either of such use. If it is wrong for both to have such use neither is going to be protected in such further use by emergency orders. Certainly the Commission has no intention of making such emergency orders general, or it could not have found as it did.

POINT VI.

THE ORDER IS BASED SOLELY ON A CONSIDERATION OF CERTAIN ECONOMIC CONDITIONS OF A CHARACTER TOTALLY INSUFFICIENT IN LAW TO SUSTAIN IT AND OVER THE CORRECTION OF WHICH THE COMMISSION HAS NO JURISDICTION.

The Commission's order cannot be sustained as a reasonable regulation of car service unless the Court is prepared to hold that it is unreasonable *per se* for a carrier to use all available facilities for the movement of all traffic offered at a given time and place. It cannot be sustained as an order to remove an undue preference, unless the

Court is prepared to hold that mere inequality in transportation service affords a sufficient basis for such an order, irrespective of all other considerations. What, then, was the basis of the order, and what is the evil which it seeks to cure?

It admits of no doubt but that the Commission was convinced that certain economic and sociological evils existed in the coal industry, which were attributable to the use of private cars, and that the existence of these evils constitute the basis for the order, and their removal its purpose. Nearly all of the testimony and all but a minor part of the report is directed to an exemplification of these conditions, their causes and consequences. Without exception every opponent of the Assigned Car Rule who testified, testified that the evil of the assigned car was to be found in its effect upon mine production, labor costs, labor turn-over, the contentment of labor, overhead costs, etc. The first witness in opposition to the Assigned Car Rule was John Callahan, Traffic Manager of the National Coal Association, who stressed the inequality of working time between assigned car mines and mines relying wholly on system cars, saying (R. 811):

> "Out of this inequality in running time grows all of the evils of the assigned car."

He elaborated this thought for two pages following. He returned to it again at page 968 in connection with Exhibit No. 33; also at page 972 in connection with Exhibit No. 35. At page 973, he stated that inequality of working time is the most far-reaching disturbance caused by the assigned car. At page 1010 he stressed the effect on labor of unequal working time.

W. B. Reed, the second witness of the National Coal Association and an accountant, devoted his entire testimony from page 1035 to 1050, as well as Exhibits Nos. 37 to 40, inclusive, to the effect of intermittent running time in increasing mine costs.

Walter D McKinney, Secretary of the Southern Ohio Coal Exchange, opened his testimony by stating at page 1452:

> "It is the use of assigned cars to produce unequal distribution of cars among mines with its consequent unequal work time and costs among mines, that in my judgment constitutes the evil of the assigned car practice in the coal industry."

The major portion of his voluminous testimony was devoted to this subject. At page 1484 in his testimony the following occurred:

> "Commission Aitchison: Every time that we have brought up an illustration, if I understand your testimony correct, it has gotten back to this point upon which your objection has turned—the unequal mine labor which results."
> "A. Primarily."

Robert Marshall, President of an Ohio District of the United Mine Workers confined his testimony almost exclusively to labor discontent resulting from unequal working time (pages 1488 to 1501).

It would serve no useful purpose to extend the list of witnesses whose complaint against the assigned car rule resolved itself into a lament of the effects of unequal running time on mine costs and mine labor with the reiterated appeal to the Commission to remedy these conditions. Such a list would include substantially every opponent of the assigned car rule who appeared.

How seriously the Commission considered this preponderating mass of the testimony is indicated by the following extracts from its reports:

(80 I. C. C. at page 550; R. 43):

> "Much of the voluminous record has dealt with the practical effect of the operation of the assigned-car practice upon mine labor. The evidence is con-

flicting in many respects, and it does not seem necessary to state it other than generally. The mine operators are not unanimous in their opinions that the result of the assigned-car practice has been detrimental to their industry; but the great majority of the mine operators, and all the respresentatives of mine labor who appeared are firmly of that conviction. Out of the mass of conflicting testimony it may be conservatively stated as established that the general effect of the assigned-car practice is to attract as many desirable miners as can be given employment to the assigned-car mine, and away from commercial mines, and particularly so in the unionized fields. The commercial mine has a more rapid labor turnover than the mine operating with assigned cars. Often these two classes of mines are located close to each other, and the miners paid upon a quantity basis in the commercial mines are rendered discontented when they are compelled to remain idle a large part of the time because of car shortage, while neighboring mines with assigned cars are operating on substantially a full-time basis. This is one factor which has contributed to the unsettled labor conditions in the bituminous mining industry during recent years, and has been urged as a reason in support of the maintenance of existing wage scales or for still higher rates of mine pay. Without attempting to equalize the fortune, opportunities, or abilities of all the bituminous-mine operations or their mine laborers, it seems appropriate to consider this effect of the practice under consideration.

"The result of the inequality in the running time as between mines receiving assigned cars and those purely commercial is that the cost of operation of the latter must be higher for each unit or production. As it is the commercial supply of bituminous coal which is restricted by the free use of the assigned car, the increased costs are most sharply felt in coal intended for commercial consumption. It appears of record that during the late war, with the elimination of assigned cars the fuel administration simultaneously lowered the

price fixed on all coal 10 cents a ton. The increase in cost because of inequality in running time is largely due to the fact that many of the expenses of the mines are constant; some are reduced but not eliminated by idle time, and the amount of the expenditures eliminated by idle time is proportionately small. The relation between the car supply and these costs is immediate. The weight of the evidence is that mine production costs rise because of a diminished car supply, but at a sharper rate. Without attempting to reconcile the conflicting testimony as to the amount of such increased cost, we may safely conclude that it is considerable and important, both to the mine operator and to the consuming public. In weighing the benefits the railroads derive from the assigned car, this indirect cost to the coal-consuming public must be given proper value."

(93 I. C. C. at page 721; R. 100):

"As we pointed out in our original report, page 550, the result of inequality in the running time as between mines receiving assigned cars and those purely commercial is that the cost of operation of the latter must be higher for each unit of production, and the amount of such increased cost is considerable and important. We think it unnecessary to add to what we said in our original report, page 550, as to the effect of the assigned-car practice, in attracting as many desirable miners as can be given employment to the assigned-car mine and away from commercial mines, and in bringing about a more rapid labor turnover at the latter than at the former."

(93 I. C. C. at page 735; R. 114):

"It was shown that during car-shortage periods private-car mines received practically a full car supply, while other mines on the same division of the same railroad received a comparatively small percentage of the cars ordered. Private-car owners

> themselves, in introducing evidence as to the necessity of the assigned-car privilege, showed in many instances the discriminatory effect of the rule. During car-shortage periods mines at which their cars were placed were able because of better car supply under the assigned-car rule to operate more regularly, at less expense, and with more efficient labor organization than such mines were able to operate with system cars only and than other mines similarly situated on the same railroads and depending entirely upon system cars were able to operate."

It cannot be doubted from the foregoing language as well as from a reading of both reports that the Commission in truth has endeavored to regulate the coal industry and to cure its ills. The dissenting Commissioners saw this. Commissioner Hall in his dissenting opinion accompanying the First Report said (80 I. C. C. 568; R. 60):

> "Much of the opposition to the assigned car is based upon its effect on mine labor. It is not for me to point out the shortcomings of the coal industry, overdeveloped as it is, with thousands of mines so situated that they can only be operated at a profit when there is a runaway market. An adequate all-the-year-around supply of transportation would leave many of those mines permanently closed, and naturally their operators become stormy petrels of the industry. The record shows that in six years the number of mines, not including wagon mines, grew from 3,669 in 1916 to 8,722 in 1921. The term 'car shortage,' as used by coal operators, is usually applied with reference to the capacity of the mines. That capacity far exceeds annual consumption or demand. Whatever may be the troubles of the coal industry they can not and will not be remedied to any appreciable extent, if at all, by the action of the majority."

Commissioner Potter in his dissenting opinion accompanying the Second Report said (93 I. C. C. 743; R. 121):

"The question of mine labor necessarily takes into account differences in circumstances arising before the service of the carrier begins, and I am unable to follow the majority that we can take those facts into consideration in determining whether undue preference or undue prejudice exists under section 3. We have the undoubted right, under the interstate commerce act, to control the facilities of the carriers so as to avoid unjust discrimination or undue prejudice as between shippers or receivers of property. We can not, however, regulate the coal industry except as it is incidentally affected by a proper regulation of car supply as a matter of transportation. The railroad-owned mine or the total-output contract mine are operated continuously the greater part of the time whether there is a car surplus or a car shortage. Other mines operate only when they have orders for coal, and in many instances only in periods of peak demand and high prices. It is only natural, therefore, that mines operating practically full time can command the better class of mine labor. It seems to me that if, during periods of car shortage, we were to undertake to regulate the car supply so as to result in equal working time for all mines, we would be going far afield in the regulation of transportation with which we have to deal.

"The finding of the majority, as I interpret it, predicates the finding of unreasonableness, unjust discrimination, and undue prejudice chiefly on the ground of the effect which the unequal distribution of cars has on mine labor."

Whenever a violation of the act is disclosed the Commission may without doubt consider economic and sociological conditions related thereto and arising therefrom. The existence of what are deemed by a majority of the Commission to be economic and sociological evils cannot, however, be made the predicate of a finding that the act has been violated. Furthermore, if it appears that the Commission was primarily influenced by such extraneous

economic conditions and that its primary purpose was to remedy or prevent economic evils arising therefrom, its order will be set aside on that ground alone.

In the *Willamette Valley* case, *supra,* 219 U. S. 433, it was urged that even though the Commission might have attached importance to the fact that the lumber manufacturers had relied upon the low rate, nevertheless the Commission also based its order upon the express finding that the new rate which it had condemned was unreasonable. The Court, however, declined to be bound by the fact that the Commission had also referred to this second theory, and indicated that it was plain that the primary basis of the Commission's order was its erroneous conception that it had the right to make the order because of its view that the lumber manufacturers had the right to rely upon the continuance of the earlier rate. Hence, the Court will not permit itself to be misled into upholding an order upon a secondary basis when the primary basis for the order is fundamentally unsound. Here there is not even a secondary basis unless what the Commission says about undue absorption of other transportation facilities may be regarded as such. The Court cannot escape the conclusion that the Commission was dominated by the conditions which it found in the coal industry and by a desire to remedy them.

It starts out by discussing these inequalities in working time and there seems to grow up out of its contemplation of these inequalities some idea that there must be a violation of the Act involved. The Commission begs the question. It assumes there must be a violation of the Act because it deplores the effects which are so much stressed by the dissatisfied operators. If the Commission could point to a violation of the Act sufficiently broad to support this universal order, it could then say that comments upon the consequences of such illegality are not inappropriate.

Incidentally, it may be observed that the record shows without contradiction that to a very large extent the inequality in the output of coal between the operators who own private cars and those who do not own private cars arises in times when there are no car shortages at all. This is because the operators who own private cars are operators who plan their business on the most comprehensive scale and either use all of their own output, amounting regularly to mine capacity, in their own plants, or have long term contracts or other regular dispositions for their output which give them a large degree of uniformity of operation throughout the year. On the other hand, the operators who do not plan and conduct their business on a correspondingly comprehensive scale are frequently shut down entirely in times of slack business, when of course there is a car surplus instead of a shortage. Evidently much of the inequality in production which has so greatly impressed the Commission has developed in times of car surplus and not in times of car shortage.

It is an interesting fact that the majority and the minority of the Commission draw exactly opposite inferences from the broad economic and social conditions to which the majority pays so much attention in its reports. The minority thinks these factors are reasons why it is in the public interest to avoid interference with long recognized enjoyment of private cars, while the majority thinks these are reasons why a radical interference with the right of the owners of private cars should be brought about. The conflict of view thus illustrated emphasizes the proposition that these broad questions of economics and sociology are not submitted by the Interstate Commerce Act to the administration of the Commission but are questions for the consideration of Congress.

When these questions have been pressed upon Congress in the past, it has refused to abolish the long settled use

of private cars by their owners. For example, in the formation of the Transportation Act, the Senate, after being urged to do so by coal operators who were desirous of forcing a wider distribution of coal purchases, adopted a provision which would have produced the effect now attempted by the Commission's order. The House refused to adopt this provision and instead adopted paragraph (12) of Section 1 which the Commission has subsequently declared constituted a statutory recognition of the rule approved in the *Traer* case. The Conference Committee adopted the House provision. Thus it is clear that Congress, upon consideration of these economic factors, has refused to make the fundamental change which was urged upon it and upon the Commission. It is of the highest importance, particularly in view of the history of this subject of private cars, that the Commission should be kept within the limits of the Act. It has no right to turn something which is not a violation of the Act into a violation of the Act merely because by going outside of the Act and considering peculiarly elusive economic problems a majority arrives at the view that certain economic inequalities are objectionable and hence a remedy can and ought to be found. The place to find the remedy is in Congress, since no violation of the Act has been found.

POINT VII.

THE ORDER IS VOID BECAUSE ARBITRARY AND UNREASONABLE AND BECAUSE IT DEPRIVES PRIVATE CAR OWNERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

Stating the grounds upon which an order of the Commission might be set aside, the Supreme Court in *Interstate Commerce Commission* v. *Illinois Central R. R.*, 215 U. S. 452, 470, said:

> "Beyond controversy, in determining whether an order of the commission shall be suspended or set aside, we must consider, *a*, all relevant questions of constitutional power or right; *b*, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and *c*, *a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power.* * * * "

Under the heading "*Necessity for ownership of private cars by critical industries and disastrous effects of the order thereon*," *supra*, the circumstances leading to the ownership and use of private cars have been fully reviewed. It appears from this review that privately owned coal cars are owned chiefly by industries to which a regular, daily and dependable supply of selected coal of uniform quality is essential to their operation. It also appears that coal

car shortages are due primarily to the overdevelopment of the coal industry and to seasonal demands for coal for ordinary commercial use. As a result, in times of peak demand aggregate car orders based upon overdeveloped productive capacity necessarily exceed the car supply available or any other car supply which it is the duty of the carriers to provide. In such times these critical industries have failed to receive that dependable supply of coal of uniform and selected quality which they require. They have therefor been driven to the ownership and use of private cars as a protection against such periodic car shortages.

Their ownership of these cars is concededly lawful and their right to their exclusive use admitted. But while recognizing such rights, the order of the Commission completely destroys the only beneficial use of the private cars thus lawfully owned. It prohibits their movement at times when the carrier has facilities sufficient to move these and all system cars on hand without undue preference as to either. It thus denies to private car owners the right to have their coal transported in their own cars for their own uses without in any way increasing car supply for system car mines. It applies irrespective of the cause of the system car shortage. The carrier on whose lines it exists may be wholly without fault. Its shortage of system cars may be due to failure of connecting lines to return or of consignee to unload promptly. Whatever be the cause of such car shortage, the transportation of coal for a private car owner proportionately in excess of that which may be contemporaneously accorded to a system car mine is prohibited absolutely. The order of the Commission is thus essentially a prohibition of commerce by administrative fiat rather than a regulation thereof or of carrier instrumentalities. The justification offered for such an unprecedented prohibition of the right to ship is the equalization of mine production, costs and labor conditions.

The supply of cars for system-car mines is in no way increased by the forced retirement of available private cars from service. On the contrary, if all private cars, and not merely the excess, were withdrawn, the distributive share of system cars for system-car mines would be reduced. Under the guise of regulating carrier instrumentalities, the Commission thus really seeks to equalize industrial fortune and opportunity and to regulate the coal industry over which its administrative functions do not extend. In its purpose and effect the order is unreasonable and arbitrary and must be condemned as such under the rule announced in *Interstate Commerce Commission* v. *Illinois Central Railroad, supra.*

It deprives both the private car owner and the railroad company of the use of privately owned cars at a time when they could be used to the mutual advantage of both. It arbitrarily reduces car supply when cars are short and prohibits the mining and transportation of coal when demand therefor is greatest. Its sole object as shown by the report, is to keep A, who owns private cars, from producing and shipping more coal than B, who owns none. It interferes with the orderly and profitable operation of the plants, industries and companies dependent upon the use of private cars for a regular and dependable supply of coal, and which have been driven to such ownership as a protection against car shortages. The beneficial enjoyment of mines, cars and plants is therefore impaired. Such an order is manifestly beyond the scope of any power delegated to the Interstate Commerce Commission, is arbitrary and unreasonable, and in its operation deprives private car owners of their property without due process of law.

This contention is further discussed in a separate brief filed by counsel for the Pennsylvania Coal & Coke Corporation.

It is respectfully submitted that the decree of the District Court should be affirmed in all respects.

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